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ALTERNATIVE DISPUTE RESOLUTION  
FOR  
U.S. NAVY CONSTRUCTION CONTRACTS

A Special Research Problem

Presented to

The Faculty of the School of Civil Engineering  
Georgia Institute of Technology

by

Jerome Paul Rakel, Jr., P.E.

In Partial Fulfillment  
of the Requirements for the Degree of  
Master of Science in Civil Engineering

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A SPECIAL REPORT FOR THE

COMMISSIONER OF THE

STATE OF MICHIGAN DEPARTMENT OF CORRECTIONS  
AND JUVENILE INSTITUTIONS

BY

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JOHN J. HARRIS, JR., JR.

IN RESPONSE TO THE REQUEST OF THE  
COMMISSIONER OF THE STATE OF MICHIGAN  
DEPARTMENT OF CORRECTIONS AND JUVENILE INSTITUTIONS

1974

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## CHAPTER I

### INTRODUCTION

In the last few years the U.S.Navy has experienced an explosion in the number of appeals of Contracting Officer's Final Decisions to the Armed Services Board of Contract Appeals or the U.S. Claims Court. In an effort to reduce this upward spiraling the Naval Facilities Engineering Command (NAVFACENGCOM) has attempted to introduce the use of Alternative Dispute Resolution to handle construction contract disputes. In recent years the private construction industry has also begun to use Alternative Dispute Resolution (ADR) as a basis for resolving construction disputes and claims rather than resorting to litigation. The major reasons for this are:

1. Time: ADR procedures can resolve a dispute or claim in weeks or months versus the years these issues can take in the courts;
2. Money: The cost of ADR procedures are greatly reduced when compared with the costs of a court trial;
3. Objectivity: ADR procedures allow the disputing parties to select neutral third parties extremely





knowledgeable in the principals and practices of the construction industry.

4. Flexibility: The ADR process can be conducted in an informal, setting avoiding the use of courts or courtrooms. This movement away from litigation and toward the use of ADR procedures has resulted in tremendous benefits to all the parties in a dispute. However the Naval Facilities Engineering Command has received a less than overwhelming response to its ADR initiatives.

This paper will examine the reasons the private construction industry has begun to use ADR to solve its litigation problems. It will then look at the formal claims process a contractor's claim must follow within the Department of Defense and NAVFACENGCOM to reach final resolution through the courts. Next the paper will examine the experience NAVFACENGCOM and the Army Corps of Engineers have had with ADR. In addition it will examine some of the reasons the Army Corps of Engineers has learned as to why the private construction industry has been reticent to join in the ADR process. Finally it will make recommendations as to how the NAVY can improve its ADR program and encourage its construction contractors to join the process.





The Contract Disputes Act of 1978 (41 U.S.C. 601-613) establishes procedures for resolving claims by contractors arising under or relating to contracts covered under the Act.<sup>1</sup> Once the contractor has received a Final Decision from the Contracting Officer, he has the recourse of appealing that decision either to a Board of Contract Appeals established by the Agency of the Federal Government executing the contract or to the U.S. Claims Court. If the contractor is still not satisfied with the decision of the Board of Contract Appeals he can appeal that decision to the Federal Appeals Court. These procedures were established to protect the legal rights of contractors doing work with the Federal Government. However, these procedures are now experiencing the same pitfalls as the civil courts, namely, long delays and escalating costs. The private sector's trend towards ADR can also provide the U.S. Navy Civil Engineer Corps with an alternative means of handling construction disputes on Navy Construction Projects.

The major problem with the procedures outlined in the Contract Disputes Act, the Federal Acquisition Regulations and various Department of Defense Regulations is that they do not provide the either the contractor or the Government

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<sup>1</sup> Public Law 95-563, Contract Disputes Act of 1978, 41 U.S. Code 601-613.



Agency with an efficient means of reaching a resolution. If the Contractor chooses to use the Agency Board of Contract Appeals he can expect to wait two to five years for a decision. During this time he is required to continue to perform under the contract in good faith. Section 33.213 of the Federal Acquisition Regulations (FAR) states:

..., Section 6(b) of the Act (Contract Disputes Act) authorizes agencies to require a contractor to continue contract performance in accordance with the contracting officer's decision pending final decision on a claim relating to the contract.<sup>2</sup>

The Government Agency does not fair much better since it is required to pay interest on any final settlement resulting from the claim.<sup>3</sup> On large claims this interest can amount to a significant amount. Finally, the administrative and legal costs of this form of claims resolution can be quite high.

The use of Alternative Dispute Resolution procedures can offer the U. S. Navy and the Department of Defense an alternate method of resolving these claims while the claim process under the Contract Disputes Act is ongoing. In fact, the Federal Acquisition Regulations support such a process. The FAR states:

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<sup>2</sup> Federal Acquisition Regulations, Change 84-6 dtd January 10, 1985, Section 33.213, page 33-6.

<sup>3</sup> Ibid, Section 33.208, page 33-5.





"It is the Government's policy to try and resolve all contractual issues by mutual agreement at the contracting officer's level, without litigation. In appropriate circumstances, the contracting officer, before issuing a decision on a claim, should consider the use of informal discussions between parties by individuals who have not participated substantially in the matter in dispute, to aid in resolving differences."<sup>4</sup>

By using ADR procedures appropriately the U.S. Navy can resolve many construction disputes quickly and equitably without having to resort to the lengthy and costly option of the claims process to the Armed Services Board of Contract Appeals.

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<sup>4</sup> Ibid, Section 33.204, page 33-4.



CHAPTER II  
ALTERNATIVE DISPUTE RESOLUTION  
IN PRIVATE INDUSTRY

In an ideal world there would never be a need for courts, for lawyers or for finding alternatives to them. Every dispute could be solved through negotiation. Unfortunately this is not an ideal world, and the construction industry is prone to disputes. As James P. Groton points out in his article "A Guide to Improving Construction Contracts":

The construction industry is unique in the business world. A typical construction project can involve the temporary amalgamation of as many as 50 different organizations, assembled as a task force for the purpose of designing and delivering a physical facility. Construction contracts are also unique in the business world. Although the typical owner-contractor contract is between only two parties, it lies at the heart of a complex network of interlocking relationships that eventually include all the parties in the task force.<sup>5</sup>

Due its very nature the Construction Industry and Construction Contracts are prone to disputes. Whenever you have more than one person interpreting a drawing or specification you have the potential for a dispute. Add the fact that our society has become significantly more

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<sup>5</sup> James P. Groton, "A Guide to Improving Construction Contracts, The Arbitration Journal, June 1986, p. 21.





litigious, is it any wonder that the construction industry has sought another way of resolving construction disputes rather than going to court.

The Civil Courts dockets are full. Federal District Courts have seen their civil case load explode from 35,000 cases in 1940 to 180,000 in 1981, a 514% increase. This equates to civil cases growing almost 6 times faster than the population.<sup>6</sup> In addition, in 1984 there were over 13.6 million civil suits filed in state courts.<sup>7</sup> Due to this explosion of civil cases an average of eighteen months elapse before a civil case is heard and it is not uncommon in some cities for the delay to reach 5 years.<sup>8</sup> In an industry such as construction where the profit margins are small, these delays in receiving payment can be catastrophic for small businesses and the Department of Defense alike.

In an effort to get around this backlog the construction industry has tried to find alternative forms of dispute resolution. The American Arbitration Association (AAA)

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<sup>6</sup> Donald D. Meisel and Walter M. Stein, "Mediation: The Possible Resolution of 'Impossible' Situations, The Construction Specifier, June 1982, p. 22.

<sup>7</sup> Kathleen M. Cullen, "ADR: Shaking Hands Instead of Shackling Them," Risk Management, June 1987, p. 28.

<sup>8</sup> ADR: Alternative Dispute Resolution For The Construction Industry, (Silver Spring, Maryland, ASFE, 1988), pp. 2-3.



reported its arbitration case load has also increased dramatically; from 460 cases in 1966 to 2831 in 1980, a 615% increase.<sup>9</sup> Also during the period 1984 - 1987 AAA handled 85 mediations in the construction industry with claims ranging in value from \$9,300 to \$28 million.<sup>10</sup> It would appear the construction industry is beginning to find an alternative to the courts.

#### A. WHAT IS ALTERNATIVE DISPUTE RESOLUTION (ADR)?

ADR is exactly what the name implies; an alternative way of resolving disputes between two parties. As H. Fielder Martin, Esq., stated in his presentation to the 28th Annual Meeting of Invited Attorneys:

ADR is any of various alternative methods used to resolve disputes in lieu of litigation. The objective of ADR is to obtain acceptable resolution of disputes in the shortest possible time, with the least possible expense and with a minimum of stress on the participants.<sup>11</sup>

ADR is any method used to resolve a dispute rather than going to court. The most familiar forms of ADR are

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<sup>9</sup> Donald D. Meisel and Walter M. Stein, op. cit. p. 24.

<sup>10</sup> Robert E. Meade, "Mediating Construction Claims," The Punch List, Vol. 10, No. 4, 1987, p. 7.

<sup>11</sup> H. Fielder Martin, Esq., "Alternative Dispute Resolution For Architects and Engineers," Presentation 28th Annual Meeting of Invited Attorneys, Baltimore, Maryland, June 28 1989, p. 3.





mediation, arbitration, mini-trials or summary jury trials, but as the field grows, the forms of ADR are evolving to meet the needs of the participants. As ADR grows it will eventually become a compliment to the existing civil court system. As Robert Raven points out in his article

"Alternative Dispute Resolution: Expanding Opportunities:"

Probably because of its name, most of us think of ADR as an alternative to court resolution of disputes. Developed properly, however, the choice of an ADR procedure or conventional litigation will not be an 'either/or' proposition. Instead, these ADR mechanisms - mini-trials, mediations, arbitrations, summary jury trials, and others - will compliment the court system and become part of an expanding menu of choices for resolving disputes.<sup>12</sup>

ADR now offers the disputants an alternative to a costly, protracted and sometimes unsatisfying process of resolving disputes in the courts. Even if ADR does not resolve the entire dispute it can serve to narrow the dispute by resolving matters where there is mutual agreement and focusing the litigation on the areas of disagreement. In this way ADR can serve as a compliment to the civil court system.

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<sup>12</sup> Robert D. Raven, "Alternative Dispute Resolution: Expanding Opportunities," The Arbitration Journal, June 1988, p. 44.



## B. WHY USE ALTERNATIVE DISPUTE RESOLUTION?

The reasons for using Alternative Dispute Resolution (ADR) are many. The first of these is time. As stated earlier litigation can take years before a dispute is heard by a judge and/or jury. Once a case is heard and a decision is given, that by no means is the end of the case. Any decision by a judge or jury is subject to any number of appeals, all of which will mean delays before a party receives its money. On the other hand ADR procedures can resolve a dispute in a matter of weeks or months. Since the disputants take an active role in finding a solution, the resolution is generally acceptable to both parties. Also, if the ADR procedure selected is binding arbitration, the decision of the arbitration panel is final except under extreme circumstances. As Weston Hester, John Kuprenas and Randolph Thomas reported in a recent article in the Journal of Performance of Constructed Facilities, an arbitrated settlement will only be set aside if there is evidence that (i) award was procured by fraud or other means; (ii) the arbiters were evidently partial; (iii) conduct of the





arbitration proceedings was prejudiced by one of the parties; or (iv) the arbiters exceeded their power.<sup>13</sup>

The second advantage is ADR costs less than litigation. The first area of cost savings is that the aggrieved party gets his money or restitution in months rather than years. In Government contracting this produces savings for both sides since the contractor does not have to borrow capital awaiting settlement and the Government pays less interest on the money paid. The second area of cost savings is in legal costs. Most lawyers bill by the hours spent working on the case. If the case is settled in a few months there are less hours billed by the lawyers. The third area of cost savings is in not having to pay experts to explain the subtleties of the construction industry to judges and juries. Project management on both sides is not tied up researching files for the litigation. ASFE sums it up this way:

When litigation is applied, hundreds of nonreimbursable hours must be logged to handle matters such as researching files, meeting with experts and attorneys, responding to interrogatories, and participating in depositions. Throughout this process, the fires of animosity are being stoked by adversarial procedures and 'litigation fallout'; i.e., fees and expenses not covered by insurance; longer work hours needed to get

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<sup>13</sup> Weston T. Hester, John A. Kuprenas, and H. Randolph Thomas, "Arbitration: A Look at Its Form and Performance", The Journal of Performance of Constructed Facilities, 113 (September 1987), p. 353.



the firm's work done; closer review of instruments of service to help assure quality despite lack of sleep, and worry about the damage that may be inflicted on one's reputation. The overall dollar drain can be huge. Certain forms of ADR can ease this loss because they can facilitate a rapid resolution through a forum which encourages a businesslike approach to the problem.<sup>14</sup>

Finally, once a case is settled through negotiation, the aggrieved party does not get to keep all the money he has been awarded. In fact a recent study by the Rand Corporation found that only about one-third of the processing costs of litigation actually reaches the plaintiff. The rest goes to pay legal fees and transaction costs.<sup>15</sup> So the legal system, once it works, does not reimburse the plaintiff his costs of getting his just due.

Another advantage of ADR is the ability to select the person or persons who will help the disputants reach an agreement. In litigation the disputants have no choice over which judge will be hearing their case and juries generally lack an understanding of the construction industry. This means judges and juries must be educated on the practices of the industry. As H. Fielder Martin stated:

Arbiters, mediators, and other third party facilitators or decision makers are 'prequalified' on the basis of previous experience in the construction business, and a

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<sup>14</sup> ASFE, op. cit., p. 6.

<sup>15</sup> Kathleen M. Cullen, op. cit., p. 28.



case can be disposed of more rapidly than before a judge or jury who must be educated about the problems and customs of the industry... In any ADR proceeding, the parties are able to select party neutrals who are familiar with the terms, customs and uses of the industry, and who have technical expertise on the subject matter. Therefore, the parties using ADR have a far greater chance of a 'blue ribbon' panel or third party neutral than a 'blue ribbon' judge or jury in litigation. Furthermore, the parties avoid the necessity of having to educate the trier of fact (or mediator) as they would a judge or jury.<sup>16</sup>

Since the neutral(s) are already familiar with the customs and practices of the industry, the parties in the dispute can feel they are getting a more just solution.

In ADR the disputants also determine the authority of the neutral(s). In mediation the mediator has no authority over the outcome of the dispute, he is simply there to facilitate the parties reaching an agreement. Arbitration can be binding or non-binding. In a mini-trial the principals on the panel are senior representatives of the two parties who hear both sides and then meet to work out a solution using their best business judgement. Also, since ADR is voluntary, either party can choose to withdraw from the proceedings at any time.

ADR is flexible. The disputants can select the method best suited to their case. If a case is litigated, the

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<sup>16</sup> H. Fielder Martin, Esq., op. cit. pp. 4-7.





procedures to be followed are set by the particular jurisdiction in which the case will be heard. In ADR the disputants determine who will hear their dispute, what authority the neutral will have in helping them resolve their dispute, the procedures that will be followed, the time they will have to reach a resolution (or for the neutral to render a finding or decision), and whether evidence uncovered in the proceeding can be used in further litigation. In short the disputants decide how they are going to resolve their differences.

ADR proceedings can be tailored to meet the needs of the dispute at hand. In litigation the rules are established by the court hearing the case and those rules are seldom waived. Under ADR the disputants decide the rules and procedures to be followed. Rules of evidence can be modified or waived altogether. Discovery procedures can be waived or limited to prevent a "fishing expedition" by opposing counsel. The proceedings can take place at the time and place chosen by the parties, in a court case the dispute is heard at the convenience of the court. In ADR the parties tailor the proceeding to meet their unique circumstances.



Finally ADR proceedings are generally confidential. In a court case the court records are a matter of public record. A court ruling can establish precedents that could have an impact on any future cases. In ADR, issues discussed cannot be used in future proceedings unless the parties agree to it. As the Association of Engineering Firms Practicing in the Geosciences (ASFE) points out in its handbook on ADR in the Construction Industry:

Confidentiality is also important with respect to nonbinding ADR procedures that may become a prelude to litigation if the proposed resolution is unacceptable to either party. In such instances, none of the information revealed during the ADR process may be used at trial.<sup>17</sup>

This allows the parties to openly discuss problems that have occurred on the project, attitudes they have toward a solution and their bottom line for reaching a solution. If the case is not resolved through ADR these positions cannot be used in any litigation that may follow.

#### C. IS ADR ALWAYS THE ANSWER?

After singing the praises of ADR one might ask why not use ADR solely for dispute resolution in the construction industry. The answer is that ADR is not always the best answer. There are many cases where ADR is not suited to

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<sup>17</sup> ASFE, op. cit., p. 5.





resolving a dispute. ADR emphasizes compromise and settlement. This has to be taken into consideration when determining whether to submit a dispute to ADR. Situations not suited for ADR include:

1. The anticipated compromise will be contrary to field understanding, custom, and practice - as it relates to responsibility or duty,
2. The result would leave a very uncomfortable feeling for an engineer who feels blackmailed for economic purposes,
3. The inevitable compromise of a situation would create a dangerous precedent,
4. The claim is totally baseless,
5. There are clear and dispositive legal defenses,
6. The scope of damages is outrageous
7. The claim involves third parties.<sup>18</sup>

Alternative Dispute Resolution is appropriate for situations where there is room for compromise. As Stephen Marcus states:

The situation appropriate for alternate dispute resolution is the situation where there are colorable, factual issues which lend themselves to the type of compromise and middle ground which leaves all parties comfortable. It is a situation where resolution by

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<sup>18</sup> Stephen D. Marcus, "Goals and Objectives for Alternative Dispute Resolution," Journal of Performance of Constructed Facilities, February 1988, p. 2.



compromise does not cause any party to feel 'violated by the system.<sup>19</sup>

ADR is only a tool to keep in one's arsenal in resolving disputes. It is not cure-all for the problems with our legal system.

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<sup>19</sup> Ibid.



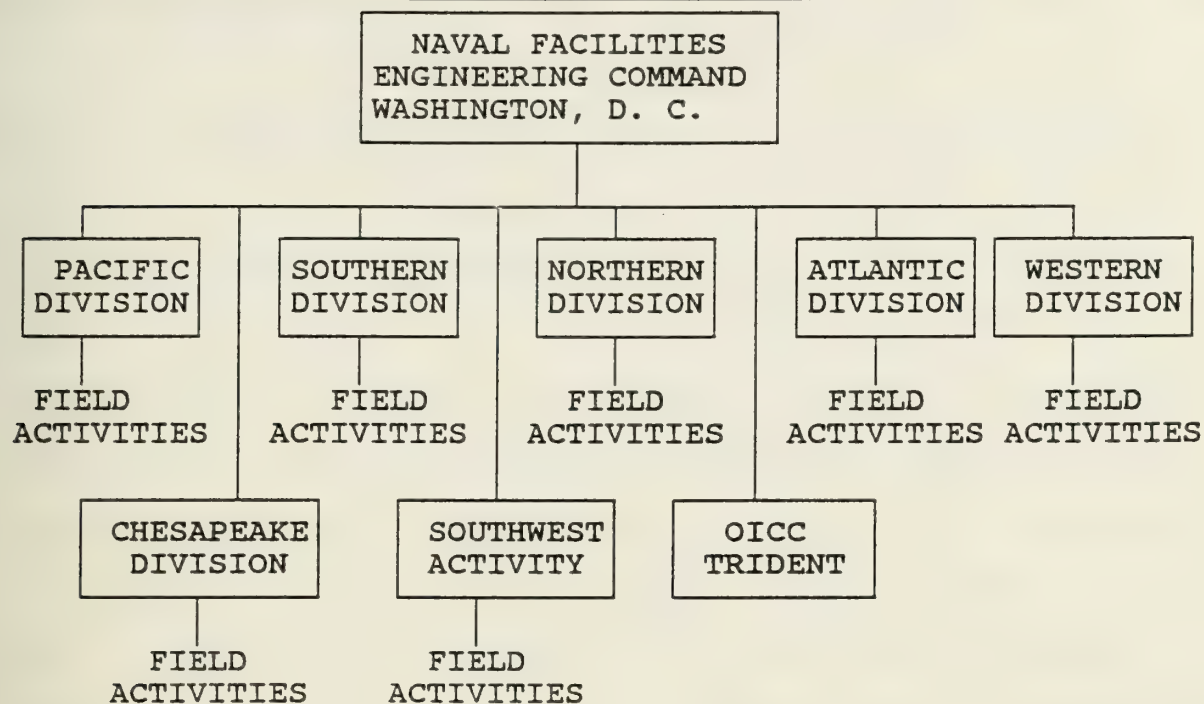
CHAPTER III  
CONSTRUCTION CLAIMS PROCESSING  
IN THE U.S. NAVY

As stated previously the Contract Disputes Act of 1978 (41 USC 601-613) established the procedures for resolving contractor claims. But to fully understand how the process works it is necessary to understand how construction contracts are administered in the U.S. Navy and how a claim is processed through the system.

The Commander, Naval Facilities Engineering Command, is tasked with contracting for the construction, maintenance and repair of facilities for the U.S. Navy.







**Figure 1: Naval Facilities Engineering Command Organization**

Figure 1 is an organizational chart of the Naval Facilities Engineering Command Construction Contracting Organization. The Naval Facilities Engineering Command (NAVFACENGCOM) is organized into 7 Engineering Field Divisions (EFD's) each with a number of field offices working for them. Each EFD has a geographic area of responsibility. Each field office is located on a Navy or Marine Corps installation and is responsible for construction at that installation and smaller Navy/Marine Corps installations in the area.



## A. THE FIELD OFFICE

Within NAVFACENGCOM, the Field Office is referred to as the Resident Officer in Charge of Construction (ROICC). The ROICC acts as the Owner's representative in the administration of Construction Contracts. As such he is responsible for the day to day administration of the contract including, but not limited to, approving contractor submittals and shop drawings, approving contractor schedules, verifying the quality of the contractor's work, reviewing and approving progress payments, negotiating change orders and time extensions and assessing liquidated damages. As with any construction contract each of these areas have a potential for a dispute. In the event of a dispute the ROICC has the responsibility to first try to resolve it for the Government.

When the contractor feels he is entitled to additional time or money he must submit a request for equitable adjustment to the ROICC with any supporting data for his request. The ROICC is responsible for reviewing the request and for conducting any initial negotiations. The NAVFACENGCOM Contracting Manual describes these responsibilities as:

When a request for adjustment has been received by the Contracting Officer (ROICC) and any required audit has been obtained, the Contracting Officer should promptly review the request and, within the limits of delegated authority and when otherwise appropriate, conduct negotiations. If





the request is deemed to be without merit, or if negotiations do not result in full agreement, the contractor shall be promptly advised in writing of the denial of the request and the basis of that determination. the denial should close with the following language:

'The Contracting Officer has determined that you have not presented sufficient justification or data to warrant the contract adjustment you have requested. If you disagree with this determination, you may request a decision of the Contracting Officer pursuant to the provisions of the Disputes Clause of your contract. Such requests should be forwarded via this office. You may submit additional information and request that the previous correspondence concerning this matter be forwarded to the Contracting Officer for further review and determination. This letter is not a Final Decision of the Contracting Officer.'<sup>20</sup>

It is this failure to negotiate a resolution and the request for a Contracting Officer's Final Decision that is the start of the claims process under the Contract Disputes Act of 1978.

Therefore it is the responsibility of the ROICC to try and resolve the dispute before it becomes part of the claims process.

If the dispute cannot be resolved at the Field Office level and the Contractor requests a Contracting Officer's Final Decision, the Field Office will forward the Contractor's request along with all the supporting documentation, both pro and con, to the

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<sup>20</sup> U.S. Department of the Navy, Naval Facilities Engineering Command, P-68, NAVFACENGCOM Contracting Manual, (Washington, D.C.: Government Printing Office, 1987), p. 120.



Engineering Field Division. The package will also contain a discussion of any areas where entitlement was agreed but the Filed Office and the Contractor could not agree on quantum or the extent of entitlement along with a Government Estimate for the value of the work so the EFD can issue a unilateral change order for those areas of agreement.<sup>21</sup>

#### B. THE ENGINEERING FIELD DIVISION.

As stated earlier the EFD is the immediate supervisor for the Field Offices, each with a specific geographic area of responsibility. Figure 2 lists the Engineering Field Divisions with their areas of responsibility. In the processing of claims the EFD's are responsible for reviewing the Contractor's request for Contracting Officer's Final Decision and making a determination of how to proceed. If the claim is less than \$500,000 then the EFD can issue the final decision. If the claims is over \$500,000 it will notify the contractor the request is being forwarded to NAVFACENGCOM for final decision and provide the contractor with an approximate date he will receive a final decision from NAVFACENGCOM.

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<sup>21</sup> Ibid, p. 121.



<u>ENGINEERING FIELD DIVISION</u>	<u>AREAS OF RESPONSIBILITY</u>
CHESAPEAKE DIVISION (Washington, D.C.)	Maryland, District of Columbia, Northern Virginia
NORTHERN DIVISION (Philadelphia, Pa.)	Maine, Vermont, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Delaware, Pennsylvania, Ohio, Michigan, Illinois, Indiana, Missouri, Iowa, Minnesota, Wisconsin, North Dakota, South Dakota, Nebraska, Kansas, Colorado, Wyoming
ATLANTIC DIVISION (Norfolk, Va.)	Virginia, West Virginia, Eastern North Carolina, Kentucky, Puerto Rico, Cuba, Iceland, Newfoundland, Bermuda, Europe, North Africa, Middle East
SOUTHERN DIVISION (Charleston, S.C.)	North Carolina, South Carolina, Georgia, Florida, Alabama, Tennessee, Mississippi, Louisiana, Arkansas, Oklahoma, Texas, New Mexico
WESTERN DIVISION (San Bruno, Ca.)	California, Arizona, Utah, Nevada, Idaho, Montana, Oregon, Washington, Alaska
PACIFIC DIVISION (Pearl Harbor, Hi.)	Hawaii, The Pacific Basin, Far East

For claims handled at the EFD level, the Contracting Officer will either return the claim to the field office with additional guidance for renegotiation; will negotiate the claim at the EFD level, or will process the claim for issuance of a Final Decision. The NAVFACENGCOM Contracting Manual states:





If the EFD Contracts Division determines that negotiations are appropriate, it will promptly initiate such action by remanding the claim to the field office, by establishing an EFD Contract Review Board to consider the claim, by establishing a negotiating team, or by other means. If the EFD 02 (Contracts Division) concurs with the field Contracting Officer that a Final Decision should be issued, the EFD shall promptly process the claim.<sup>22</sup>

If the Government and the Contractor agree on some issues in the claim, the Government will issue a unilateral change order covering those areas of agreement and will process the remaining areas for a Final Decision.

The processing of a request for Final Decision begins with the EFD staff preparing a Disposition Plan to ensure disposition of the claim within 60 days as required by the Federal Acquisition Regulations and the Contract Disputes Act.<sup>23</sup> (If the claim is in excess of \$50,000 and, due to the complexity or size of the claim, a Final Decision cannot be issued in the required 60 days, the contractor will be notified of the delay within the 60 day timeframe. The notification will include an estimated date for issuance of a Final Decision.)<sup>24</sup>

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<sup>22</sup> Ibid, p. 121

<sup>23</sup> Ibid, p. 122.

<sup>24</sup> Federal Acquisition Regulations, (Washington, D.C., Government Printing Office, 1984), p. 33-5.



The Disposition Plan will begin with the preparation of legal and technical memoranda on the merits and weaknesses of both the contractor's and Government positions. The technical memorandum will identify the relevant contract requirements and provide an analysis of the contractor's allegations and the ROICC's analysis. It will comment on whether the facts support the contractor's position or the ROICC's position and address the amount claimed. The legal memorandum will generally be prepared after the technical memorandum and will provide a legal opinion of the strengths and weaknesses of both cases. It will also include a discussion of relevant Armed Services Board of Contract Appeals and Claims Court cases. Finally it will include a litigation risk and cost assessment. The purpose of these memoranda is not to decide the claim but to assist the Contracting Officer in reaching a Final Decision.

Another method available in helping the Contracting Officer reach a Final Decision is the EFD Contracts Review Board mentioned earlier. The NAVFACENGCOM Contracting Manual describes appearances before the Board as:

The purpose of the EFD Contracts Review Board is to give the contractors the opportunity to present their claims to senior procurement personnel at the EFD. There are no written procedures governing appearances before the Board. The proceedings are relatively informal. No transcripts



are made or permitted to be made. Testimony is not under oath. The rules of evidence are not applied.<sup>25</sup>

The board consists of two senior Civil Engineer Corps officers and a representative from the Contracts Division. The contractor has the opportunity to present his case without interruption from the ROICC. During the presentation the Board may ask questions for clarification. The contractor may present his case himself or have his attorney make the presentation. After the contractor's presentation Government counsel will present the Government's case through the use of witnesses. After hearing both sides, the Board will retire to discuss the case. It may recommend issuing a Final Decision denying the claim or re-entering negotiations. The Board may re-open negotiations as a continuation of the hearing. If an agreement is reached, the Board will recommend issuance of a change order encompassing the terms of the settlement. If agreement cannot be reached, the Board will recommend issuance of a Contracting Officer's Final Decision.<sup>26</sup>

The Contracting Officer's Final Decision must advise the contractor of the decision reached and the basis of that decision. As such, the decision will include a statement of the compensation sought and a statement of the factual basis for the

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<sup>25</sup> P-68, NAVFACENGCOM Contracting Manual, p. 125.

<sup>26</sup> Ibid., p. 126.





contractor's claim, a statement of the decision reached, a statement of the basis of the decision and a final statement that this is a Final Decision of the Contracting Officer. It will also include a statement that this decision may be appealed to the Armed Services Board of Contract Appeals (ASBCA) or directly to the U.S. Claims Court. This statement will include instructions on how to file an appeal and the time frames for filing such an appeal. If the contractor chooses to appeal the Contracting Officer's Final Decision he has 90 days to do so to the Armed Services Board of Contract Appeals or within 12 months to the U.S. Claims Court from the date he received the Final Decision.<sup>27</sup>

#### C. HEADQUARTERS, NAVAL FACILITIES ENGINEERING COMMAND

As stated previously, the Commander, Naval Facilities Engineering Command is tasked by the Secretary of the Navy and the Chief of Naval Operations with the maintenance, repair and construction of shore facilities for the U.S. Navy. In that capacity, NAVFACENGCOM provides policy and guidance for contracting for this work. In addition it coordinates and tracks the processing of claims for its construction contractors. For claims in excess of \$500,000 NAVFACENGCOM will

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<sup>27</sup> Ibid., p. 124.



render the Final Decision. In rendering that decision it follows the same policies and procedures as the EFD's. If a contractor appeals a Contracting Officer's Final Decision to the ASBCA the Government is represented by either EFD or NAVFACENGCOM counsel or by the Litigation Division of the Office of the General Counsel of the Navy. If the contractor appeals directly to the U.S. Claims Court the Government is represented by the Department of Justice. In either case NAVFACENGCOM coordinates the support of the trial counsel.

Once an appeal is filed, efforts will continue to settle the dispute prior to the case being heard by the ASBCA or the Claims Court. However trial attorneys cannot settle claims themselves or direct the issuance of contract modifications without the consent of the Contracting Officer who issued the Final Decision. If a trial attorney reaches a potential settlement he will prepare a memorandum for the Contracting Officer with his recommendations regarding settlement. The memorandum will address the litigative risks associated with trial in light of the results of discovery, research and counsels evaluation of the Government's and the contractor's position. Based on this information the Contracting Officer may, if appropriate, make a



determination that the claim has merit and approve the settlement recommendation.<sup>28</sup>

#### D. ARMED SERVICES BOARD OF CONTRACT APPEALS

The Contract Disputes Act of 1978 directed that "an agency board of contract appeals may be established within an executive agency when the agency head ... determines from a workload study that the volume of contract claims justifies the establishment of a full-time agency board..."<sup>29</sup> Within the Department of Defense that board is the Armed Services Board of Contract Appeals (ASBCA). The board is established to represent the Secretaries of the Army, Air Force, Navy and Defense in hearing appeals to Contracting Officers' Final Decisions from the various services. The rules for the ASBCA are covered by Appendix A to the Department of Defense Supplement to the Federal Acquisition Regulations. The Board's charter states:

The Armed Services Board of Contract Appeals (referred to herein as the Board) shall consider and determine appeals from decisions of contracting officers pursuant to the Contract Disputes Act of 1978 (Public Law 95-563, 41 U.S.C. 601-613) relating to contracts made by (i) the Departments of Defense, Army, Navy and Air Force or (ii) any other executive agency when such agency or the Administrator for

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<sup>28</sup> Ibid., p. 126.3.

<sup>29</sup> Contract Disputes Act of 1978, 41 U.S. Code 601-618, Public Law 95-563, Section 8(a).





Federal Procurement Policy has designated the Board to decide the appeal.<sup>30</sup>

Therefore, when the Board hears an appeal it is acting for the head of the agency from which the Final Decision was rendered.

The Board is not a court, and the members of the board hold the title of Administrative Judges. However, that is where the difference between the Board and a court trial ends. The procedures for the hearing of an appeal read very much like the procedures to be followed in a court trial. For example, when an appeal is received it is docketed. Once both sides are notified that the appeal has been docketed they must prepare briefs stating their respective positions. There are procedures for discovery, depositions, interrogatories to parties, admission of facts, production and inspection of documents, and the Federal Rules of Evidence are followed. (Appendix 1 is a copy of the Charter and Rules for the Armed Services Board of Contract Appeals). Due to the formality of the procedures and the volume of appeals being heard by the board it is not uncommon for an appeal to take 2 to 4 years to be heard according to Mr. Gary Garrison from the Claims Division of NAVFACENGCOM and Mr. Steve Lingenfelter, Division Counsel, South Atlantic Division, U.S. Army Corps of Engineers.

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<sup>30</sup> Department Of Defense Supplement to the Federal Acquisition Regulations, (Washington, D.C., Government Printing Office, 1988), p. A:5.



If the claim is small the system offers an accelerated or expedited procedure to resolve the dispute. The option to use these procedures is strictly left up to the Contractor. The contractor must notify the board for his decision to use either accelerated or expedited procedures within 60 days of his receipt of notice of docketing of his appeal before the board unless he can convince the board that his delay in selection is warranted.

Expedited ASBCA procedures are to be used for claims less than \$10,000 in value. The procedures to be followed are much less formal than the formal ASBCA hearing procedure. Basically, once the contractor elects to use expedited procedures the government provides the assigned judge with all pertinent documents. The judge contacts both parties to clarify questions and determine if the parties wish a hearing. If so, the time and date are set at the time of the interview. Discovery by both parties is limited to the extent that the overall time requirements of the procedure will be met. Within 30 days of hearing both sides, the judge will issue a short summary finding of fact and



conclusions. The entire procedure will be completed within 120 days.<sup>31</sup>

The Accelerated procedures are designed to provide the parties with a decision within 180 days. The procedures are available for claims of less than \$50,000. As with the Expedited Procedure, the choice of whether to use them lies entirely with the contractor. Under these procedures both parties are encouraged, as much as possible consistent with adequate presentation of their case, to waive pleadings, discovery and briefs. Decisions will be rendered by one administrative judge and the decision will normally be short and contain only summary findings of fact and conclusions.<sup>32</sup>

#### E. PROBLEMS WITH THE PRESENT SYSTEM

Personnel interviewed for this paper agree the present system of handling claims and appeals of Final Decisions needs improvement. The system is slow, costly and does not always provide a just resolution to the problem. What is needed is a

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<sup>31</sup> U.S. Department of Defense, U.S. Department of Defense Supplement to the Federal Acquisition Regulations, Washington, D.C.: U.S. Government Printing Office, 1988, p. A.13.

<sup>32</sup> Ibid., p. A:14.





critical examination of the claims process as it exists now and then a discussion of ways to improve the system.

The system is lacking at the field office level. When a contractor submits a request for equitable adjustment it is generally due to unforeseen construction site conditions or due to some action on the part of the ROICC or his staff. In either case, it calls for the ROICC to examine his procedures and admit he or someone on his staff made a mistake. Unforeseen site conditions means someone missed something on the site survey or in the plans and specifications. This oversight requires the ROICC to turn to the firm that designed the facility to determine if something was missed. The person that did the design or approved the design is forced to admit a mistake. People generally do not like to admit they are wrong. Therefore a significant amount of effort is expended proving they were "right." This causes each side to become more entrenched in their respective positions, thereby hampering any constructive dialogue toward resolution.

Once the claim is denied at the local level and the contractor requests a Final Decision, the ball is placed in the EFD's court. The EFD must review the positions taken by both sides and see if there is any merit in the contractor's case. If the EFD feels there is some merit to the claim, it is returned to



the field office for further negotiations. In the majority of the cases the EFD supports its field personnel and issues a Final Decision supporting the field personnel. This further polarizes the situation and makes compromise more difficult. In the majority of the cases the Contracting Officer's Final Decision is appealed, indicating the contractor's did not feel the system was fair. It is then left to the ASBCA or the Claims Court to decide the issue.



**Table II**  
**1989 CLAIMS AND APPEALS DATA**

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EFD	NUMBER OF CLAIMS RECEIVED	NUMBER RETURNED FOR NEGOTIATION	NUMBER OF FINAL DECISIONS	NUMBER OF APPEALS (NOTE 1)
SOUTHDIV	85	15	52	35
LANTDIV	140	31	78	29
WESTDIV	219	23	95	89
CHESDIV	74	11	25	7
NORTHDIV	92	35	50	30
PACDIV	30	1	10	14
TRIDENT	19	1	26	26
SOUTHWESTACT	21	0	21	10
NAVFAC TOTALS	680.00	117.00	357.00	240.00

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To illustrate that the system needs improvement, Table 1 provides a breakdown, by EFD, of the number of claims received and the number of those claims returned for negotiation during 1989. The remainder had Final Decisions issued. The table also includes the number of appeals each EFD had to their Final Decisions in 1989. As can be seen the system is not very effective since over 67% of the Final Decisions are appealed. Nor was 1989 the exception. Table 2 is a breakdown of the Final Decisions issued and appeals made by year since 1970 at





**Table III**  
**Appeals of NAVFAC Final Decisions, by year**

YEAR	FINAL DECISIONS	APPEALS	PERCENT OF DECISIONS APPEALED
1970	44	0	??
1971	57	0	??
1972	74	8	10.81
1973	77	25	32.47
1974	123	56	45.53
1975	130	57	43.85
1976	127	100	78.74
1977	197	101	51.27
1978	198	97	48.99
1979	216	111	51.39
1980	207	88	42.51
1981	219	87	39.73
1982	244	84	34.43
1983	290	114	39.31
1984	320	157	49.06
1985	322	232	72.05
1986	577	393	68.11
1987	582	338	58.08
1988	688	433	62.94
1989	357	240	67.23

NAVFACENGCOM. Since 1984 NAVFACENGCOM averaged having at least 50% of its Final Decisions appealed to the ASBCA or the Claims Court. This is an indication that the system needs to do a better job of resolving disputes at the Final Decision stage.



Once an appeal is filed the job of the field office and the EFD office personnel as well as the EFD counsel is not over. Field and the EFD staff must put in a tremendous amount of time preparing the Government's case. Mr. Larry Millhouse of the Claims Division at Southern Division, Naval Facilities Engineering Command estimated that approximately 32,000 man hours were expended by the SOUTHDIV staff and its field offices handling claims in 1989. That equates to approximately 16 man-years of effort. When that figure is extrapolated to cover all of NAVFACENGCOM it can be seen that significant cost savings could be realized if a procedure or procedures could be found to make the claims process more efficient.



CHAPTER IV  
ALTERNATIVE DISPUTE RESOLUTION  
WITHIN THE DEPARTMENT OF DEFENSE

Both the Naval Facilities Engineering Command and the U.S. Army Corps of Engineers have tried to use Alternative Dispute Resolution Procedures in the past but with differing degrees of success. While the Corps of Engineers has been fairly successful with the program, the Naval Facilities Engineering Command has had little success in getting private contractors to participate in the program. A comparison of the techniques used, along with case studies of each organizations experiences with ADR will reveal the areas of success and help identify areas that can be improved.

A. NAVAL FACILITIES ENGINEERING COMMAND ADR

The Naval Facilities Engineering Command instituted an ADR test program in 1987 in response to a directive from the Assistant Secretary of the Navy for Shipbuilding and Logistics. This directive was in response to a directive





from the then Secretary of the Navy John Lehman. In his memorandum, Secretary Lehman stated:

The Navy has experienced an explosion in many areas of its litigation over the past five years, including a 100% increase in contract disputes before the Armed Services Board of Contract Appeals (ASBCA). We must explore alternative methods of resolving cases in litigation which both efficiently use scarce resources and adequately protect the Navy's interests. At the same time, every reasonable step must be taken to resolve disputes prior to litigation.<sup>33</sup>

The program advocated by Secretary Lehman included the mini-trial, summary binding ASBCA procedures, and summary non-binding ASBCA procedures.

The Assistant Secretary of the Navy for Shipbuilding and Logistics' memorandum directed:

...to ensure that ADR procedures are adequately tested...I am directing that the following actions be taken: (1) All Navy contracting officers shall, where appropriate, afford contractors pursuing disputes of \$25,000 or less the opportunity to utilize the "Summary Binding ASBCA" outlined in the ADR procedures; (2) In cases of disputes greater than \$25,000, contracting Officers shall perform a review to consider the appropriateness of utilizing a "Mini-Trial" as outlined in the ADR procedures.<sup>34</sup>

In October, 1987 NAVFACENGCOM instituted a pilot program using these techniques to try and reduce the backlog of

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<sup>33</sup> John Lehman, "The Department of the Navy Alternative Dispute Resolution Program", Office of the Secretary of the Navy, Washington, D.C., 23 December 1986.

<sup>34</sup> Everett Pyatt, "The Department of the Navy Alternative Disputes Resolution Program", Office of the Assistant Secretary of the Navy for Ship Building and Logistics, Washington, D.C., July 13 1987.



cases before the ASBCA. The pilot program included the following ADR procedures:

#### 1. THE MINI-TRIAL

The Mini-Trial as envisioned by the Secretary of the Navy would be very similar to the mini-trial that is standard in private industry ADR procedures. It would not be a trial at all but rather a structured forum for principals from the disputing parties to hear each sides case and then work out a settlement between them. The mini-trial would have three distinct stages, all of which would usually be completed in 90 days. According to the Secretary of the Navy's memorandum of 23 December 1986 these are:

(i) The pre-hearing stage. This stage covers the time between agreement on written mini-trial procedures and commencement of the mini-trial hearing. During this time the parties will conduct whatever preparatory activities that are permitted by the agreement. (ii) The hearing stage. During this stage the representatives of each party present their respective positions to the principals. Times for presentations would be limited. (iii) Post Hearing discussion stage. In this stage the principals would meet to discuss resolution of the dispute. The Secretary of the Navy's memorandum also envisions the use of a neutral advisor to act as an impartial third party to provide the



principals advice on government contract law. The memo recommends using an Administrative Judge from the ASBCA as a neutral advisor if one is available. If an Administrative Judge is not available then the Navy could agree to a neutral advisor from the private sector. The Secretary's memo envisioned the mini-trial as the most commonly used ADR technique for dispute resolution.<sup>35</sup>

## **2. SUMMARY BINDING ASBCA PROCEDURE**

Under this procedure each side would make a limited presentation to a single ASBCA judge. Presentation and rebuttal times would be limited by agreement. After both sides made their presentation and any rebuttal, the judge would decide the case from the bench. Under this procedure the parties would waive their respective rights to appeal under the Contract Disputes Act of 1978.<sup>36</sup>

Appendix 2 to this paper contains copies of the Secretary of the Navy's memorandum. In addition, to support the expanded use of ADR to reduce the backlog of cases before the ASBCA,

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<sup>35</sup>U.S. Department of the Navy, Office of the Secretary of the Navy, "Implementation of Alternative Disputes Resolution Test Program," Not Pub, 1987, pp. 2-4.

<sup>36</sup> Ibid. pp. 4-5.





the ASBCA now sends out a notice to an appellate regarding ADR and its potential use in resolving their dispute with the Government. A copy of that notice is also included in Appendix 2.

## B. NAVAL FACILITIES ENGINEERING COMMAND'S EXPERIENCE WITH THE ADR PROCESS.

To date the Naval Facilities Engineering Command's experience with the ADR procedures advocated by the Secretary of the Navy has been less than spectacular. In 1988 NAVFACENGCOM and its contractors submitted only 9 cases to the Summary Binding ASBCA procedures outlined above. In 1989, out of 121 potential cases where the contractors were offered the use of ADR, only 4 accepted. Two of the cases that went to the summary binding ASBCA procedures are outlined below:

### **1. CASE STUDIES**

Case 1: The case was centered on the issue of whether power factor correction coils not expressly called for in the contract were nevertheless contractually required to ensure the specified radio frequency interference filters would meet contract specifications. The ASBCA, before agreeing to



hear the case under the Summary Binding procedures expressed concern that the technical aspects of the materials involved were beyond the board's expertise. Both parties urged the board to hear the case and agreed that formal litigation would be reinstituted if the board felt insufficient technical evidence was provided. Both parties made their presentations after which the board found in the favor of the contractor.<sup>37</sup>

Case 2: This case involved several small claims for delay and disruption under a contract for rehabilitation of naval housing units. The dispute centered around the parties conduct during contract performance. After presentations the board found partially in favor of the contractor.<sup>38</sup>

After these cases NAVFACENGCOM reviewed the transcripts and findings and determined that the decisions would have been substantially the same if the claims had gone all the way through the formal board procedures.<sup>39</sup>

If these procedures are saving time and litigation costs and giving essentially the same results as the formal board, why

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<sup>37</sup> David G. Ranowsky, "Claims: The Navy's Better Way", Constructor, May 1989, p. 20.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.



are contractors reluctant to participate. According to Mr. Gary Garrison of NAVFACENGCOM's claims division, the reasons have to do with the contractor's unfamiliarity with the new procedures and their fear of the unknown. Even though the ASBCA process is long and costly, it is a known quantity while these new procedures are unknown and untried. This may partially be an answer but a better answer may lie in the timing of the ADR process. According to Mr. Garrison ADR is being used as an alternative to litigation and is not proposed until after a Contracting Officer's Final Decision. Once a final decision is rendered, the Contracting Officer has basically said, "This is my position, if you don't like it I'll see you in court." Contractors may be wary of trying anything different, especially if proposed by the Government, once that final decision has been given. If ADR was introduced before a Contracting Officer's Final Decision there is still a possibility of a resolution and usually litigation is not anticipated.

However, as previously discussed, based on the NAVFACENGCOM's track record of NAVFACENGCOM on having Final Decisions appealed a better time to introduce the idea of ADR is before the Contracting Officer renders his final decision. During this phase both sides are still talking and no one's position is hardened.





One part of the NAVFACENGCOM organization has taken this idea to heart and is using a form of ADR before the contracting officer's final decision. Western Division, Naval Facilities Engineering Command, has a program called the Disputes Review Board (DRB) that has met with tremendous success.

## **2. THE DISPUTES REVIEW BOARD.**

The Disputes Review Board was established about a year ago to try and help reduce the backlog of claims pending at WESTDIV. According to Mr. Tom Sabadini of WESTDIV's claims division the board consists of three government representatives, one from the contracts division, one from the construction division, and a representative from the division counsel. There are only two rules that apply during the board sessions: (i) There are no lawyers for either side; and (ii), one side cannot interrupt the other while it is making its presentation. The remaining rules are very flexible and are adjusted, changed, or done away with altogether in the interest of finding the facts and reaching a solution.

The board travels to the construction site to conduct its review. Before going to the site each member of the board reviews the claim file and prepares questions to ask in the



event either side's presentation does not cover all the material. At the site each side makes its presentation, the contractor and the ROICC for the Government. After hearing both sides presentation and rebuttals, the board makes a recommendation to the Contracting Officer regarding a final decision.

To date the DRB has been a great success. When the board formed, there were between 250 and 260 claims awaiting processing at WESTDIV. These claims varied in age from 3 months to 5 years. Now the backlog is down to around 30 cases, all of them less than a year old. In 1989 the DRB addressed 96 claims with the following results:

Total Value: \$28,087,467

\* Negotiated by the DRB: 41

Negotiated Amount: \$9,944,588

\* Resolved by Final Decision: 27

Dollars awarded by decision: \$ 0

Value of Claims Denied: \$2,482,666

Final Decisions Appealed: 5

\* Returned to ROICC for Negotiation: 21

Value of claims: \$1,542,277

\* Claims withdrawn by Contractor: 5

Value: \$99,368

\* Continued: 2



When asked why he felt there were so few final decisions appealed, Mr. Sabadini said the contractors who have participated in the DRB felt they had their position heard and were satisfied. They were not always happy with the outcome, but they felt they got justice. He also said it is critical that this process occur before a final decision is rendered. By hearing both sides and encouraging discussion from both sides the Board is able to get at the truth and render a final decision that is just.

Appendix 3 contains the procedures for the Disputes Review Board as used by Western Division, Naval Facilities Engineering Command.

#### C. ADR PROCEDURES USED BY THE U.S. ARMY CORPS OF ENGINEERS

The U.S. Army Corps of Engineers has adopted a different approach to the use of ADR for resolving contract disputes. The cases chosen to date have been ones that have easily lent themselves to resolution through ADR. The procedures have closely followed those used in private industry, so private industry has not felt the Corps was creating a new game with new rules.





## **1. THE MINI-TRIAL.**

The Corps of Engineers first experiment with ADR was the use of the mini-trial. The reasons the Corps used the mini-trial are:

### **a. Puts the Decision Back in the Hands of the Managers:**

The initial decisions in a dispute are generally made by middle level managers. These decisions, whether right or wrong serve to establish the respective positions in a dispute. Senior management is often not brought in until the battle lines are drawn and the dispute is ready to go to the courts. The mini-trial brings the senior level managers back into the picture and requires them to make a business decision, something they are trained to do. The Corps explains it this way:

Typically, disputes are handled by middle level managers. By the time senior managers get involved in a dispute, sides are already polarized. The senior manager is likely to hear only his organization's position. Mini-trials put the facts before senior managers. They get to hear all sides of the issue, not just their own, and can take into account the relative strength of their organization's case, the risks involved in proceeding to court, the added costs of a court case, etc. Typically middle level managers do not have the authority to make these kinds of trade-offs. Senior managers retain the decisionmaking authority, and their decisions can be based upon a complete review of the facts."<sup>40</sup>

### **b. Greater Flexibility in Possible Settlements**

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<sup>40</sup>U.S. Department of the Army, U.S. Army Corps of Engineers, The Mini-Trial, Washington D.C.; U.S. Government Printing Office, 1989.



A court trial or judicial proceeding tries to decide who is right and who is wrong. It is a win - lose situation. This leads to an adversarial relationship between the parties that does not foster a desire to reach a mutually beneficial resolution. The mini-trial presents both side's case then allows the senior level managers to work together to reach a solution without assigning blame or determining who is right or wrong.

#### **c. Time Savings**

As stated before it is now common for it to take 3 to 5 years for a court or appeals board to hear a case and render a decision. The Army's experience with the mini-trial has been that disputes have been resolved in a matter of months instead of years.

#### **d. Cost Savings**

The old adage is "time is money." This is very true in a dispute that goes to court. The Government must pay interest on any final settlement, lawyers' time is expensive, management time is lost in researching files and aiding in discovery. The mini-trial cuts these costs by limiting the amount of discovery, the number of witnesses that may be called and the time for presentations. This forces the lawyers to concentrate on the issues that best support their case and not to go off on tangents. Finally,



since a decision is made in months versus years, the reduction in interest payments can be substantial.

The Corps has also been selective in the use of the mini-trial. As with any form of ADR, the mini-trial is not suited to every case or dispute. As Lester Edelman and Frank Carr from the Corps state:

When selecting a case for mini-trial, the nature of the dispute must be considered. Cases involving areas of law which are unsettled are not appropriate for mini-trial... In addition, an overriding consideration may dictate litigating the claim for a decision if the unresolved legal issue involves the establishment of important legal precedent.<sup>41</sup>

In cases where the Corps has used the mini-trial, the results have been excellent. Appendix 4 of this paper is the pamphlet the Corps of Engineers has published concerning the use of the mini-trial.

## 2. THE DISPUTES RESOLUTION BOARD

A second form of Alternative Dispute Resolution that the Corps of Engineers has found successful is the Disputes Resolution Board (DRB). This form of the DRB differs from the DRB used by Western Division, Naval Facilities Engineering Command, discussed previously. The DRB used by the Corps is patterned from the DRB successfully used by the

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<sup>41</sup>Lester Edelman and Frank Carr, "The Mini-Trial: An alternative Dispute Resolution Procedure, The Arbitration Journal, March 1987, p. 11.





State of Washington Department of Transportation. John Coffee describes the DRB in Washington State as:

The use of a DRB for ongoing resolution of contract claims is a relatively new process in the State of Washington. The use of the board does not alter or eliminate any of the existing claim resolution procedures, including litigation. The DRB is a three-person panel of impartialists with expertise in technical areas such as tunnels and other structures. The DRB is selected as soon after award of the contract as possible. One member of the board is selected by the owner, one by the contractor, and the third is selected by the first two members. Both the owner and the contractor must approve the other party's member selection. The decisions rendered by the DRB are not binding on either party.<sup>42</sup>

The procedures the Corps follows for the DRB are similar to those from Washington but with a few modifications. The Corps procedures are as follows:

1. If the Government and the Contractor agree to a Disputes Resolution Board, the formal agreement creating the board will be executed within 60 days of contract execution.

2. Board membership criteria will be the same as the Washington State DRB (acceptability to both sides) but with one additional stipulation: No member shall have a financial interest on the Contract, except for payment for board services. No member shall have been employed by either party within a period of two years prior to award of the

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<sup>42</sup> John D. Coffee, "Disputes Resolution Boards in Washington State," The Arbitration Journal, December 1988, pp. 58-59.



contract. The cost of board services will be shared equally by both parties.

3. The board will make periodic visits to the construction site, as appropriate, to remain familiar with the progress of the work.

4. If the Contractor objects to an oral decision or order, he must request a written decision or order from the Contracting Officer.

5. After receiving the Contracting Officer's written decision or order, if the contractor still objects, he must file a written protest with the Contracting Officer, stating the basis of his objection. The Contracting Officer will review the contractor's protest and make a preliminary decision. Should the contractor object to the preliminary decision the matter can either be referred to the DRB, or the Contractor can request a Final Decision from the Contracting Officer. The contractor is free to appeal the final decision in accordance with the Contracts Disputes Act of 1978.

6. If the contractor and the Contracting Officer agree to submit the dispute to the Board, the request for review must be made to the board within 30 days of the contracting Officer's preliminary decision.

7. Each side is given the opportunity to be heard by the DRB. The DRB will submit its recommendations in writing



towards factual (as opposed to legal) resolution of the dispute to both parties within 30 days following conclusion of the hearing before the board.

8. Within 30 days of receipt of the board's recommendations the Government and the contractor shall respond in writing to the other stating their concurrence with the boards recommendation. If both sides concur the government will process any required contract modification. If the sides do not agree with the board's recommendations the Contracting Officer will issue his final decision on the matter and the dispute will proceed in accordance with the Contracts Dispute Act of 1978.<sup>43</sup>

According to Mr. Steve Lingenfelter, Division Counsel, South Atlantic Division, U.S. Army Corps of Engineers, the number of DRB members is flexible. On smaller contracts, a one member board may be more beneficial since the contract value may not justify the cost of a three member panel. The Mobile, Alabama District Office of the Corps of Engineers has had the most experience in using the DRB, and each time it has been used, it has been successful in resolving the dispute. Appendix 5 contains the draft procedures for the

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<sup>43</sup> U.S. Department of the Army, South Atlantic Division, U.S. Army Corps of Engineers, "Alternative Disputes Review Process: Disputes Resolution Board (Draft), 1986.





use of the DRB in South Atlantic Division, U.S. Army Corps of Engineers.

### 3. NON-BINDING ARBITRATION

The last ADR procedure the Corps is using is non-binding arbitration. It is currently being used to resolve disputes surrounding the construction of the Mountain Warfare School at Fort Drum, New York. The contract award amount was \$517 million, and the disputes involve 92 issues with a claimed amount of approximately \$40 million.

Since the arbitration panel is composed of non-government personnel, the procedure must be non-binding since non-government personnel cannot obligate the U.S. Government for the expenditure of funds. According to Lieutenant Commander Alan Terpolilli, Civil Engineer Corps, on exchange with the U.S. Army Corps of Engineers at Fort Drum, the panel will hear each issue separately and provide a ruling on the relative merit of each side's position. This ruling will serve as the basis to re-open negotiations on the issue. It is hoped this opinion from the arbitration panel will serve to get the opposing sides moving toward a negotiated settlement. Any issue that cannot be resolved will be processed as a claim and handled in accordance with the Contract Disputes Act. Appendix 6 is a copy of the



Arbitration Agreement between the U.S. Army Corps of Engineers and Morrison-Knudson.

E. THE CORPS OF ENGINEERS EXPERIENCE WITH ADR: CASE STUDIES

According to Mr. Lingenfelter the Corps of Engineer's experience with ADR has been a very positive one. In every instance where the Corps has used ADR, the results have been beneficial to all the parties involved. The majority of the cases in which ADR has been used has been after a Contracting Officer's Final Decision. Mr. Lingenfelter said this was because the concept of ADR on Government Contracts was still relatively new. The DRB however rules before a Final Decision and it has served to prevent claims and to resolve disputes earlier.

1. THE MINI-TRIAL

The most often quoted Corps experience with the mini-trial was over a dispute that arose during the construction of the Tennessee-Tombigbee Waterway. The dispute involved differing site conditions. As the Corps describes it:

The Corps' second mini-trial involved a dispute arising out of the construction of the Tennessee Tombigbee Waterway. The \$55.6 million claim (including interest) involved differing site conditions, and was filed at the Corps of Engineers Board of Contract Appeals by



Tenn-Tom Constructors, Inc., a joint venture composed of Morrison-Knudson, Brown & Root, and Martin K. Eby, Inc. A vice-president of Morrison-Knudson acted as the principal for the joint venture, and the Ohio River Division Engineer represented the government. A law professor, who is an expert in Federal contract law, was the neutral advisor. One interesting aspect of this case is that following a three-day mini-trial conference the senior managers met, but decided that they could not resolve the issue without additional information and scheduled a follow-up one day mini-trial conference two weeks later. Following the second conference, the principals agreed to settle the claim for \$17.2 million, including interest.<sup>44</sup>

The claim was originally filed in 1983, was denied and appealed in 1984, but was settled in 1985, less than a year after the appeal. Based on the track record of appeals to the Board of Contract Appeals, if the claim had followed the normal claims process the case would have been resolved sometime in 1986 to 1988, some one to three years later. After the mini-trial the Army Inspector General investigated the mini-trial results and determined the settlement was in the best interest of the government and concluded "... the mini-trial, in certain cases, is an efficient and cost effective means for settling contract disputes."<sup>45</sup>

Other examples of the Corps' use of the mini-trial include:

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<sup>44</sup> U.S. Department of the Army, U.S. Army Corps of Engineers, The Mini-Trial, Washington, D.C.; Government Printing Office, 1989, p. 7.

<sup>45</sup> Ibid.





\* A \$630,570 claim by Industrial Contractors, Inc. that was resolved by a three-day mini-trial for a settlement of \$380,000.

\* Resolution of some sixty claims for a total of \$105 million from the construction of the King Khalid Military City, Saudi Arabia. The claims were settled for \$7 million.

\* Resolution of claims from the construction of a visitor's center at a recreation facility totalling \$765,000. The final settlement was for \$288,000.

\* Nine appeals totalling \$515,000 from a contract for repair and modification of the Greenup Lock and Dam on the Ohio River. The final settlement was for \$155,000 after a two and a half day mini-trial.

\* Resolution of seven claims arising from the construction of the Consolidated Space Operation Center in Colorado totalling \$21.2 million. Final settlement was for \$3.7 million.<sup>46</sup>

All of these claims involved large amounts of money. This should not lead one to believe the mini-trial is suited to only large claims. The mini-trial can be structured to handle claims of most any size.

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<sup>46</sup> Ibid.



## 2. THE DISPUTES RESOLUTION BOARD

As stated previously the Mobile District of the Army Corps of Engineers has the most experience with the Disputes Resolution Board. Two of the cases handled through the DRB procedure are:

- \* A dispute between the Corps and Granite Construction concerning the source of sand for a construction project. After discussions between the parties it was agreed to submit the dispute to a one member DRB for recommendations. The original claim was for \$1,925,865 plus interest and was settled for \$725,630 plus interest.

- \* A dispute regarding extended overhead between Buildex Corporation and the Corps for \$60,000 plus interest. The parties agreed to a three member DRB to review the dispute. The final settlement was for \$30,000 plus interest. Each of these cases were settled in less than 120 days, significantly less than the two to four years the same type of claims take to go through the formal claims process.

## F. THE FUTURE OF ADR IN THE DEPARTMENT OF DEFENSE

The case studies just presented demonstrate there is a place for ADR in dispute resolution on both Army and Navy Construction contracts. Both the Corps of Engineers and the



Naval Facilities Engineering Command are committed to trying to get ADR to work. However, they have both met with resistance from the private contracting community in getting the program off the ground. Any study on the use of ADR in Navy Construction contracts not only must address the procedures available but also must address ways of getting the contractors to agree to use ADR.





## CHAPTER V

### GETTING ADR OFF THE GROUND

Alternative Dispute Resolution is growing in acceptance throughout the business community. Nearly 500 companies, corporations and law firms are members of the Center for Public Resources, Inc, a non-profit organization which advocates the use of ADR in the business world.<sup>47</sup> A recent article summarized the growing interest in ADR:

Ten years ago there were no law school courses offered in dispute resolution. Today, over one-half of the law schools in the United States have an identifiable program in dispute resolution. There were very few attorneys who classified themselves as professional mediators. Today, it is estimated that over 2,000 attorneys include mediation as a vital part of their practice. No bar association had a dispute resolution committee. Today, over 100 bar associations have created such committees.<sup>48</sup>

The University of Chicago recently reported that, based on a survey of U.S. colleges and universities, there are 334 conflict resolution courses now offered in business degree

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<sup>47</sup> U.S. Department of the Army, U.S. Army Corps of Engineers, The Mini-Trial, Washington, D.C., U.S. Government Printing Office, 1989, p. 8.

<sup>48</sup> Ray & Devonshire, "Dispute Resolution in Law Schools: Extracurricular or Essential Study", Dispute Resolution, Summer, 1988, quoted in George J. Siedel, "Present and Future Directions in ADR Research", American Business Law Journal, Fall 1988, p. 337.



programs.<sup>49</sup> The AAA has reported a 181% increase in their case load between 1970 and 1980.<sup>50</sup> All this would indicate the U.S. Navy should find welcome acceptance for their initiative to bring ADR into the resolution of construction disputes.

However, the exact opposite has occurred. When the Navy introduced its ADR initiatives in 1987, it received a luke warm reception. In 1988, Assistant Secretary of the Navy for Shipbuilding and Logistics Everett Pyatt wrote a letter to the president of the Associated General Contractors of America (AGC) soliciting the AGC's assistance in encouraging its members to participate in the Navy's ADR program. But, in 1989, of the 121 cases in which NAVFACENGCOM suggested using ADR procedures, only 4 contractors accepted. The question is 'Why is the Navy having so much trouble in getting cooperation for its ADR program?'

The Army Corps of Engineers also experienced resistance to its ADR program. In June, 1989, in an effort to find ways of improving contractor participation in the ADR process,

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<sup>49</sup>Wehr, "Conflict Resolution Studies: What Do We Know?", noted in Seidel, "Present and Future Directions in ADR Research," The American Business Law Review, 26 (1988), p. 387.

<sup>50</sup>Donald D. Meisel & Walter M. Stein, "Mediation: The Possible Resolution of 'Impossible' Situations," The Construction Specifier, June 1982, p. 22.



the South Atlantic Division of the Corps hosted a roundtable discussion with representatives of the construction industry and their legal counsel. The results of this meeting give a good insight into the resistance to ADR on government construction contracts and provide some good lessons learned for improving contractor participation. The round table found the following obstacles to participation:

- \* Tradition/corporate culture favors the usual way of doing business (including litigation) while avoiding ADR as an unknown.

- \* There is a lack of incentives to settle. The usual way of dispute resolution through the Contracts Dispute Act is the 'safe' way.

- \* Professional vanity: Technically trained professionals may feel there is only one 'right' answer to a problem. To admit there may be some merit in the other side's position is a blow to their professional self image.

- \* Lack of Trust: Each side feels the other is not being open and above board with them; contractors are 'claims artists' and the government is 'out to get' the most from the contractor while giving up the least.

- \* ADR is a signal of a 'weak' case. If one side proposes ADR it feels its case will not stand up to the scrutiny of a court battle. This may lead the other side to become more entrenched in its position.





\* The need to justify the ADR settlement. ADR proceedings are generally confidential. However, the government must be able to support any settlement decision to outside auditors.

\* ADR is counter to the financial interest of outside counsel. Lawyers bill their clients on hours they spend working on their case. Expediting resolution of the dispute means the lawyers will have less billable hours.

\* Outside counsel's fear of disappointing the client's desire for a strong advocate. Outside counsel feels that if a client hires them they must try and get the biggest settlement possible. Counsel earns its reputation as a litigator, not as a problem solver.<sup>51</sup>

To overcome these obstacles the roundtable suggested the following solutions:

\* Increase ADR Training and Awareness.

\* Include ADR options in contracts.

\* Promote the attitude that litigation is a last resort.

\* Involve objective decisionmakers.

\* Focus on results.

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<sup>51</sup> Department of the Army, U.S. Army Corps of Engineers, "Meeting Summary of South Atlantic Division, U.S. Army Corps of Engineers ADR Round Table."



\* Encourage cooperative training courses in ADR between industry and Government.

\* Improve project communication channels.

\* Have the ASBCA encourage ADR solutions to appeals.

\* Establish procedures for including the ADR option earlier in the disputes process.

\* Increase awareness that ADR is profitable.

\* Have clients take a more active role in dispute resolution rather than relying on a "hired gun" outside counsel.

\* Train inside and outside counsel together in ADR.<sup>52</sup>

It is obvious from this roundtable discussion that while industry is aware of Alternative Dispute Resolution and its benefits there is still a corporate reluctance to try the unknown. Any plan to improve the use of ADR on Navy Construction Contracts must address these reservations and seek to overcome them. ADR provides excellent opportunities to resolve disputes quickly and efficiently, but unless both sides are made aware of their options and the benefits, the status quo will remain the preferred method.

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<sup>52</sup> Ibid.



## CHAPTER VI

### RECOMMENDATIONS

As stated previously any plan to increase the use of ADR for the resolution of disputes on Navy Construction Contracts not only must address the various ADR procedures that should be used for dispute resolution but also must address the government's and private industry's reluctance to try something new. In order to expand the use of ADR on Navy Construction Contracts for dispute resolution, the following recommendations are made:

#### A. EXPAND THE SCOPE AND VARIETY OF THE ADR PROCEDURES CURRENTLY OFFERED.

Currently the Navy offers only the mini-trial, the summary binding ASBCA procedure and the summary non-binding ASBCA procedure for ADR. In addition these procedures are only offered after a Contracting Officer's Final Decision. This limited array of ADR procedures does not provide the spectrum of alternatives necessary to encourage increased participation. Also by limiting the use of ADR to after the contracting officer's Final Decision an opportunity for





dispute resolution before the dispute becomes a claim is missed.

By offering ADR procedures before the contracting officer's Final Decision the contracting officer can establish all the facts thereby making the Final Decision actually final without having it appealed afterward. Final Decisions may be avoided by reaching a negotiated settlement. Once a Final Decision has been issued the parties' positions become polarized as they prepare for litigation. Compromise is less likely and ADR procedures are less likely to succeed.

The Dispute Review Board, as used by Western Division, Naval Facilities Engineering Command, should be expanded to all the Engineering Field Divisions as well as NAVFACENGCOM Headquarters. The board provides the contracting officer with an excellent forum for determining the facts of the disputes and for getting the ROICC and the contractor talking. This way the contracting officer can see exactly what the circumstances of the dispute are by listening to and questioning the parties involved in the dispute. WESTDIV has found this much more valuable than reading briefs prepared by both sides and their counsel. Then, if a contracting officer's Final Decision must be made, it is much less likely to be appealed.



The Disputes Review Board used by Washington State and the Army Corps of Engineers also can help the Contracting Officer ascertain all the facts of a disputes. By having a neutral third party or parties with no monetary interest in the outcome review the situation and make a recommendation as to its disposition, the contracting officer can make a better decision. The cost of having this neutral or neutrals make an independent evaluation will be a great deal less than the cost of handling an appeal of a Final Decision.

The mini-trial is good, but having a ASBCA judge sit as the neutral advisor can cause problems. As Mr. Lingenfelter pointed out the ASBCA judge is used to running the proceedings during his hearing. In the mini-trial the parties do not want the neutral advisor to run the show. That is the job of the principals. The neutral advisor is there only to advise the principals on legal matters and to facilitate the principals reaching a resolution. The neutral advisor should not be in a position to affect the outcome of the mini-trial. He is there only to help the principals solve the problem. The mini-trial is suitable for use either before or after a contracting officer's Final Decision. But, as with the other forms of ADR advocated, using a mini-trial before a contracting officer's Final



Decision may help to avoid the necessity of issuing a Final Decision altogether.

Another procedure that should be added is non-binding arbitration similar in form to the procedures used by the Army at Fort Drum. This procedure should be used after a contracting officer's Final Decision. As LCDR Terpolilli pointed out from his work with the Corps at Fort Drum, the non-binding arbitration does not mean any less work for the field staff or the counsel. What it does do is force all the parties to take a hard look at their respective positions while all the facts are still fresh in their minds. People involved in the dispute are still readily available; they have not been re-assigned, found another job, moved away or died. This can help the parties view their positions in the cold light of a semi-formal proceeding and get the parties off their hardened positions. Then the parties might be more willing to compromise and reach a negotiated settlement.

The final point of this recommendation is that NAVFACENGCOM must become more aggressive in pursuing the ADR option. As the Corps roundtable pointed out contractors are wary of trying anything new, even if it seems to offer a better way. The first step should be to include a discussion of ADR





options as part of the pre-construction meeting held for every NAVFACENGCOM construction contract. This would be an excellent forum to discuss the options and put ADR procedures in place, such as a Disputes Review Board like the Corps uses. During the pre-construction conference all the parties are filled with optimism about the upcoming project and are more likely to agree to ADR procedures for dispute resolution. Once a dispute arises, it is difficult to get the parties to agree on anything, much less a way to work out their differences.

#### B. PROVIDE ADR TRAINING.

From discussions with Mr. Gary Garrison from NAVFACENGCOM, Larry Millhouse at SOUTHDIV, Tom Sabadini at WESTDIV and LCDR Ken Butrym at the SOUTHDIV Contracts Office, Naval Air Station, Atlanta, it was apparent that there is a basic lack of understanding about the ADR process within NAVFACENGCOM. This is not unexpected since there is a lack of understanding about ADR and what it can do throughout the construction industry. As stated previously, the legal and business communities are quickly learning about the values of ADR. However the construction industry has not been as quick on the uptake. For example, the Georgia Institute of Technology offered its first course in Alternative Dispute Resolution Procedures in the fall of 1989 as part of its



Construction Management curriculum. This highlights the need for ADR training at all levels in the construction industry as well in as the NAVFACENGCOM Contracting Organization. Once all the contracting personnel from the field activities through the Engineering Field Divisions to Headquarters, Naval Facilities Engineering Command have an understanding of Alternative Dispute Resolution, they will be in a better position to get their contractors interested in participating.

The best place to start training NAVFACENGCOM personnel in ADR procedures is through the Negotiation Workshop offered by the NAVFACENGCOM Contract Training Center. This way all new NAVFACENGCOM contracting personnel are exposed to ADR and are aware of the potential ADR has for resolving disputes early.

In that same vein, contractors who do business with NAVFACENGCOM on a regular basis should be given the opportunity to attend these same ADR training courses. This way they learn alongside the personnel they will be working with on a day-to-day basis. This will not only serve to make them aware of ADR but also will give them some insight as to the ADR techniques that they can apply to their dealings with the Navy. It will serve to improve



communication between the field office and the contractor thereby reducing the number of disputes.

### C. GET THE WORD OUT

All the ADR training in the world will do no good if the contractors are unaware it exists. NAVFACENGCOM must become aggressive in getting the word to its contractors about the advantages of ADR. The South Atlantic Division of the Corps of Engineers had the right idea with the round table discussion it hosted. It got the contractors in with their counsel and got them involved with using and promoting ADR on Corps contracts. NAVFACENGCOM should sponsor the same types of forums at the EFD level. This way contractors will become aware of the ADR options NAVFACENGCOM offers and advantages these options offer the contractors.

The second way of getting the word out is through magazine articles and trade journals. NAVFACENGCOM needs to blow its own horn about the success it has had with ADR. Specifically the cost and time savings NAVFACENGCOM and its contractors have realized through ADR.

Finally NAVFACENGCOM should include a notice about the availability of ADR procedures when it responds to a contractor's request for Final Decision. By making the





contractor aware of ADR while he is waiting for a Final Decision, the contracting officer may be able to encourage the contractor to seek resolution through some other means than the formal claims process. If a resolution is reached, the need for a Final Decision and the accompanying possible appeal goes away, and costly potential litigation is avoided.



## CHAPTER VII

### CONCLUSIONS

Alternative Dispute Resolution offers a way to avoid the expense and headaches of going to court. ADR allows the managers to regain control of the dispute and to solve it in a efficient, business-like manner. Law schools and bar associations have learned this and are now teaching ADR to their students and members. The private construction industry is beginning to learn of ADR and its benefits but is lagging behind the legal and business communities. The Army Corps of Engineers and the Naval Facilities Engineering Command have also begun to learn these lessons and have instituted an ADR program for their construction contracts. However more must be done to get ADR installed as a viable option for dispute resolution on Navy Construction Contracts.

The disputes resolution process using the Armed Services Board of Contract Appeals is not efficient. It costs both the contractor and the Navy a tremendous amount of time, money, manpower and strains working relations. Once the contractor wins his appeal (if he wins) he only sees a small



part of the money. The rest goes to pay his legal and administrative costs for filing the appeal. If the Navy wins, it is still out its legal and manpower costs. Therefore, with the ASBCA it is a no win situation.

Alternative Dispute Resolution offers another way to resolve disputes. Properly applied it can save time, money, relationships, and manpower. However, ADR is not a replacement for the claims process under the Contracts Disputes Act of 1978. There are certain cases that are not proper for ADR resolution such as cases involving areas of law that are unsettled, cases where the use of ADR will set a dangerous precedent, cases where there is overwhelming legal precedent in the favor of the government or cases where it is necessary to pursue litigation to establish a legal precedent. Rather, to quote Mr. Lingenfelter, "ADR is just another arrow in your quiver for the resolution of disputes." ADR is not intended to supersede or supplant the claims process. It is there to augment the process.

The Navy has stated it is dedicated to making the ADR process work for its construction claims. To do this it must make some adjustments to its ADR policy. These are:

1. Expand the scope of ADR processes offered.
2. Provide training in the use of ADR procedures.





3. Make the construction contracting community aware of its ADR policy and the community's options..

By making these adjustments the Navy can succeed in its goal of using ADR to reduce its litigation caseload at the Armed Services Board of Contract Appeals.



APPENDIX 1

CHARTER AND RULES

OF

THE ARMED SERVICES BOARD OF CONTRACT APPEALS



## APPENDIX A

## ARMED SERVICES BOARD OF CONTRACT APPEALS

*Approved 1 May 1962**Revised 1 May 1969**Revised 1 September 1973**Revised 1 July 1979*

## Part 1—Charter

1. There is created the Armed Services Board of Contract Appeals which is hereby designated as the authorized representative of the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy and the Secretary of the Air Force, in hearing, considering and determining appeals by contractors from decisions of contracting officers or their authorized representatives or other authorities on disputed questions. These appeals may be taken (a) pursuant to the Contract Disputes Act of 1978 (41 U.S.C. Sect. 601, et seq.), (b) pursuant to the provisions of contracts requiring the decision by the Secretary of Defense or by a Secretary of a Military Department or their duly authorized representative or board, or (c) pursuant to the provisions of any directive whereby the Secretary of Defense or the Secretary of a Military Department has granted a right of appeal not contained in the contract on any matter consistent with the contract appeals procedure. The Board may determine contract disputes for other departments and agencies by agreement. The Board shall operate under general policies established or approved by the Under Secretary of Defense (Research and Engineering).

2. ~~Membership of the Board shall consist of attorneys at law who have been qualified in the manner prescribed by the Contract Disputes Act of 1978. Members of the Board are hereby designated Administrative Judges.~~ There shall be appointed from members of the Board a chairman and two or more vice-chairmen. Appointment of the chairman and vice-chairmen and other members of the Board shall be made by the Under Secretary of Defense (Research and Engineering) and the Assistant Secretaries of the Military Departments responsible for procurement. The chairman and vice-chairmen shall serve in that capacity for a two-year term unless sooner removed or reappointed for an additional term or terms. The Under Secretary will also designate the order in which the vice-chairmen will act for the chairman in his absence. In the absence of a vice-chairman, the chairman or acting chairman may designate a member of the Board to serve as a temporary vice-chairman.





**ARMED SERVICES BOARD OF CONTRACT APPEALS**

3. It shall be the duty and obligation of the members of the Armed Services Board of Contract Appeals to decide appeals on the record of the appeal to the best of their knowledge and ability in accordance with applicable contract provisions and in accordance with law and regulation pertinent thereto.

4. The chairman of the Board shall be responsible for establishing appropriate divisions of the Board to provide for the most effective and expeditious handling of appeals. He shall be responsible for assigning appeals to the divisions for decision without regard to the military department or other procuring agency which entered into the contract. A division may consist of one or more members of the Board. The chairman shall designate one member of each division as the division head. The division heads and the chairman and vice-chairmen shall constitute the senior deciding group of the Board. A majority of the members of a division or of the senior deciding group shall constitute a quorum for the transaction of the business of each, respectively. Decisions of the Board shall be by majority vote of the members of a division participating and the chairman and a vice-chairman, unless the chairman refers the appeal for decision by the senior deciding group. The decision of the Board in cases so referred to the senior deciding group shall be by majority vote of the participating members of that group. The chairman may refer an appeal of unusual difficulty, significant precedential importance, or serious dispute within the normal decision process for decision by the senior deciding group. An appeal involving \$50,000 or less may be decided by a single member or fewer members of the Board than hereinbefore provided for cases of unlimited dollar amount, under accelerated or expedited procedures as provided in the Rules of the Board and the Contract Disputes Act of 1978.

5. The Board shall have all powers necessary and incident to the proper performance of its duties. Subject to the approval of the Under Secretary of Defense (Research and Engineering) and the Assistant Secretaries of the Military Departments responsible for procurement, the Board shall adopt its own methods of procedure, and rules and regulations for its conduct and for the preparation and presentation of appeals and issuance of opinions. ~~The Military Departments and other procuring agencies shall provide legal personnel to prepare and present the contentions of the departments or agencies in relation to appeals filed with the Board.~~ It shall not be necessary for the Board, unless it otherwise desires, to communicate with more than one trial attorney in each of the departments or agencies concerning the preparation and presentation of appeals and the obtaining of all records deemed by the Board to be pertinent thereto.

6. Any member of the Board or any examiner, designated by the chairman, shall be authorized to hold hearings, examine witnesses, and receive evidence and argument





## ARMED SERVICES BOARD OF CONTRACT APPEALS

for consideration and determination of the appeal by the designated division. A member of the Board shall have authority to administer oaths and issue subpoenas as specified in Section 11 of the Contract Disputes Act of 1978. The chairman may request orders of the court in cases of contumacy or refusal to obey a subpoena in the manner prescribed in that Section.

7. The Chairman shall be responsible for the internal organization of the Board and for its administration. He shall provide within approved ceilings for the staffing of the Board with non-member personnel, including hearing examiners, as may be required for the performance of the functions of the Board. The chairman shall appoint a recorder of the Board. Such personnel shall be responsible to and shall function under the direction, supervision and control of the chairman.

8. The Board will be serviced by the Department of the Army for administrative support for its operations as required. Administrative support will include budgeting, funding, fiscal control, manpower control and utilization, personnel administration, security administration, supplies, and other administrative services. ~~The Department of the Army, Navy, Air Force and the Office of the Secretary of Defense will participate in financing the Board's operations on an equal basis and to the extent determined by the Assistant Secretary of Defense (Comptroller).~~ The cost of processing appeals for departments and agencies other than those in the Department of Defense will be reimbursed.

9. The chairman of the Board will furnish the Secretary of Defense and to the Secretaries of the Military Departments by October 31 of each year a report containing an account of the Board's transactions and proceedings for the preceding fiscal year. Within 30 days following the close of a calendar quarter, the chairman shall forward a report of the Board's proceedings for the quarter to the Under Secretary of Defense (Research and Engineering), the Assistant Secretaries of the Military Departments responsible for procurement, and to the Director of the Defense Logistics Agency. Such reports shall disclose the number of appeals received, cases heard, opinions rendered, current reserve of pending matters, and such other information as may be required.



## ARMED SERVICES BOARD OF CONTRACT APPEALS

10. The Board shall have a seal bearing the following inscription: "Armed Services Board of Contract Appeals." This seal shall be affixed to all authentications of copies of records and to such other instruments as the Board may determine.

11. This revised charter is *effective April 21, 1980.*

## APPROVED:

W. GRAHAM CLAYTOR, JR.  
*Deputy Secretary of Defense*

CLIFFORD L. ALEXANDER, JR.  
*Secretary of the Army*

E. HIDALGO  
*Secretary of the Navy*

HANS M. MARK  
*Secretary of the Air Force*



## Part 2—Rules

Approved 15 July 1963

*Revised 1 May 1969*

Revised 1 September 1973

Revised 30 June 1980

## PREFACE

## I. JURISDICTION FOR CONSIDERING APPEALS

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## II. LOCATION AND ORGANIZATION OF THE BOARD

(a) The Board's address is Skyline Six, 5109 Leesburg Pike, 7th Floor, Falls Church, VA 22041, telephone (202) 756-8500 (receptionist), 756-8502 (recorder).

(b) The Board consists of a chairman, two or more vice chairmen, and other members, all of whom are attorneys at law duly licensed by a state, commonwealth, territory, or the District of Columbia. Board members are designated Administrative Judges.

(c) There are a number of divisions of the Armed Services Board of Contract Appeals, established by the Chairman of the Board in such manner as to provide for the most effective and expeditious handling of appeals. The Chairman and a Vice Chairman of the Board act as members of each division. Appeals are assigned to the divisions for decision without regard to the military department or other procuring agency which entered into the contract involved. Hearing may be held by a designated member (Administrative Judge), or by a duly authorized examiner. Except for appeals processed under the expedited or accelerated procedure, the decision of a majority of a division constitutes the decision of the Board, unless the chairman refers the appeal to the Board's Senior Deciding Group (consisting of the chairman, vice chairmen and all division heads), in which event a decision of a majority of that group constitutes the decision of the Board.





**ARMED SERVICES BOARD OF CONTRACT APPEALS**

Appeals referred to the Senior Deciding Group are those of unusual difficulty, significant precedential importance, or serious dispute within the normal division decision process. For decisions of appeals processed under the expedited or accelerated procedure, see Rules 12.2(c) and 12.3(b).

**PRELIMINARY PROCEDURES****1. Appeals, How Taken**

(a) Notice of an appeal shall be in writing and mailed or otherwise furnished to the Board within 90 days from the date of receipt of a contracting officer's decision. A copy thereof shall be furnished to the contracting officer from whose decision the appeal is taken.

(b) Where the contractor has submitted a claim of \$50,000 or less to the contracting officer and has requested a written decision within 60 days from receipt of the request, and the contracting officer has not done so, the contractor may file a notice of appeal as provided in subparagraph (a) above, citing the failure of the contracting officer to issue a decision.

(c) Where the contractor has submitted a properly certified claim over \$50,000 to the contracting officer or has requested a decision by the contracting officer which presently involves no monetary amount pursuant to the Disputes clause, and the contracting officer has failed to issue a decision within a reasonable time, taking into account such factors as the size and complexity of the claim, the contractor may file a notice of appeal as provided in subparagraph (a) above, citing the failure of the contracting officer to issue a decision.

(d) Upon docketing of appeals filed pursuant to (b) or (c) hereof, the Board may, at its option, stay further proceedings pending issuance of a final decision by the contracting officer within such period of time as is determined by the Board.

(e) In lieu of filing a notice of appeal under (b) or (c) hereof, the contractor may request the Board to direct the contracting officer to issue a decision in a specified period of time, as determined by the Board, in the event of undue delay on the part of the contracting officer.



**ARMED SERVICES BOARD OF CONTRACT APPEALS****2. Notice of Appeal, Contents of**

A notice of appeal should indicate that an appeal is being taken and should identify the contract (by number), the department and/or agency involved in the dispute, the decision from which the appeal is taken, and the amount in dispute, if known. The notice of appeal should be signed personally by the appellant (the contractor taking the appeal), or by the appellant's duly authorized representative or attorney. The complaint referred to in Rule 6 may be filed with the notice of appeal, or the appellant may designate the notice of appeal as a complaint, if it otherwise fulfills the requirements of a complaint.

**3. Docketing of Appeals**

When a notice of appeal in any form has been received by the Board, it shall be docketed promptly. Notice in writing shall be given to the appellant with a copy of these rules, and to the contracting officer.

**4. Preparation, Content, Organization, Forwarding, and Status of Appeal File**

(a) *Duties of Contracting Officer* - Within 30 days of receipt of an appeal, or notice that an appeal has been filed, the contracting officer shall assemble and transmit to the Board an appeal file consisting of all documents pertinent to the appeal, including:

(1) the decision from which the appeal is taken;

(2) the contract, including pertinent specifications, amendments, plans and drawings;

(3) all correspondence between the parties relevant to the appeal, including the letter or letters of claim in response to which the decision was issued;

(4) transcripts of any testimony taken during the course of proceedings, and affidavits or statements of any witnesses on the matter in dispute made prior to the filing of the notice of appeal with the Board; and

(5) any additional information considered relevant to the appeal.



**ARMED SERVICES BOARD OF CONTRACT APPEALS**

Within the same time above specified the contracting officer shall furnish the appellant a copy of each document he transmits to the Board, except those in subparagraph (a)(2) above. As to the latter, a list furnished appellant indicating specific contractual documents transmitted will suffice.

(b) *Duties of the Appellant* - Within 30 days after receipt of a copy of the appeal file assembled by the contracting officer, the appellant shall transmit to the Board any documents not contained therein which he considers relevant to the appeal, and furnish two copies of such documents to the government trial attorney.

(c) *Organization of Appeal File* - Documents in the appeal file may be originals or legible facsimiles or authenticated copies, and shall be arranged in chronological order where practicable, numbered sequentially, tabbed, and indexed to identify the contents of the file.

(d) *Lengthy Documents* - Upon request by either party, the Board may waive the requirement to furnish to the other party copies of bulky, lengthy, or out-of-size documents in the appeal file when inclusion would be burdensome. At the time a party files with the Board a document as to which such a waiver has been granted he shall notify the other party that the document or a copy is available for inspection at the offices of the Board or of the party filing same.

(e) *Status of Documents in Appeal File* - Documents contained in the appeal file are considered, without further action by the parties, as part of the record upon which the Board will render its decision. However, a party may object, for reasons stated, to consideration of a particular document or documents reasonably in advance of hearing or, if there is no hearing, of settling the record. If such objection is made, the Board shall remove the document or documents from the appeal file and permit the party offering the document to move its admission as evidence in accordance with Rules 13 and 20.

(f) Notwithstanding the foregoing, the filing of the Rule 4(a) and (b) documents may be dispensed with by the Board either upon request of the appellant in his notice of appeal or thereafter upon stipulation of the parties.





## ARMED SERVICES BOARD OF CONTRACT APPEALS

5. Motions

(a) Any motion addressed to the jurisdiction of the Board shall be promptly filed. Hearing on the motion shall be afforded on application of either party. However, the Board may defer its decision on the motion pending hearing on both the merits and the motion. The Board shall have the right at any time and on its own initiative to raise the issue of its jurisdiction to proceed with a particular case, and shall do so by an appropriate order, affording the parties an opportunity to be heard thereon.

(b) The Board may entertain and rule upon other appropriate motions.

6. Pleadings

~~Appellant shall file with the Board an original and two copies of a pleading setting forth simple, concise and direct statements of its claims.~~ Appellant shall also set forth the basis, with appropriate reference to contract provisions, of each claim and the dollar amount claimed, to the extent known. This pleading shall fulfill the generally recognized requirements of a complaint, although no particular form is required. Upon receipt of the complaint, the Board shall serve a copy of it upon the Government. Should the complaint not be received within 30 days, appellant's claim and appeal may, if in the opinion of the Board the issues before the Board are sufficiently defined, be deemed to set forth its complaint and the Government shall be so notified.

~~(b) Government - Within 30 days from receipt of complaint or the aforesaid notice from the Board, the Government shall prepare and file with the Board an original and two copies of an answer thereto.~~ The answer shall set forth simple, concise and direct statements of Government's defenses to each claim asserted by appellant, including any affirmative defenses available. Upon receipt of the answer, the Board shall serve a copy upon appellant. Should the answer not be received within 30 days, the Board may, in its discretion, enter a general denial on behalf of the Government, and the appellant shall be so notified.





**ARMED SERVICES BOARD OF CONTRACT APPEALS**

(c) A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The Board, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rules 11, 13 or 20. The determination of foreign law shall be treated as a ruling on a question of law.

**7. Amendments of Pleadings or Record**

The Board upon its own initiative or upon application by a party may order a party to make a more definite statement of the complaint or answer, or to reply to an answer. The Board may, in its discretion, and within the proper scope of the appeal, permit either party to amend its pleading upon conditions fair to both parties. When issues within the proper scope of the appeal, but not raised by the pleadings, are tried by express or implied consent of the parties, or by permission of the Board, they shall be treated in all respects as if they had been raised therein. In such instances, motions to amend the pleadings to conform to the proof may be entered, but are not required. If evidence is objected to at a hearing on the ground that it is not within the issues raised by the pleadings, it may be admitted within the proper scope of the appeal, provided, however, that the objecting party may be granted a continuance if necessary to enable it to meet such evidence.

**8. Hearing Election**

After filing of the Government's answer or notice from the Board that it has entered a general denial on behalf of the Government, each party shall advise whether it desires a hearing as prescribed in Rules 17 through 25, or whether it elects to submit its case on the record without a hearing, as prescribed in Rule 11.

**9. Prehearing Briefs**

Based on an examination of the pleadings, and its determination of whether the arguments and authorities addressed to the issues are adequately set forth therein, the Board may, in its discretion, require the parties to submit prehearing briefs in any case in which a hearing has been



**ARMED SERVICES BOARD OF CONTRACT APPEALS**

elected pursuant to Rule 8. If the Board does not require prehearing briefs either party may, in its discretion and upon appropriate and sufficient notice to the other party, furnish a prehearing brief to the Board. In any case where a prehearing brief is submitted, it shall be furnished so as to be received by the Board at least 15 days prior to the date set for hearing, and a copy shall simultaneously be furnished to the other party as previously arranged.

**10. Prehearing or Presubmission Conference**

(a) Whether the case is to be submitted pursuant to Rule 11, or heard pursuant to Rules 17 through 25, the Board may upon its own initiative, or upon the application of either party, arrange a telephone conference or call upon the parties to appear before an administrative judge or examiner of the Board for a conference to consider:

(1) simplification, clarification, or severing of the issues;

(2) the possibility of obtaining stipulations, admissions, agreements and rulings on admissibility of documents, understandings on matters already of record, or similar agreements that will avoid unnecessary proof;

(3) agreements and rulings to facilitate discovery;

(4) limitation of the number of expert witnesses, or avoidance of similar cumulative evidence;

(5) the possibility of agreement disposing of any or all of the issues in dispute; and

(6) such other matters as may aid in the disposition of the appeal.

(b) The administrative judge or examiner of the Board shall make such rulings and orders as may be appropriate to aid in the disposition of the appeal. The results of pre-trial conferences, including any rulings and orders, shall be reduced to writing by the administrative judge or examiner and this writing shall thereafter constitute a part of the record.





## ARMED SERVICES BOARD OF CONTRACT APPEALS

### 11. Submission Without a Hearing

Either party may elect to waive a hearing and to submit its case upon the record before the Board, as settled pursuant to Rule 13. Submission of a case without hearing does not relieve the parties from the necessity of proving the facts supporting their allegations or defenses. Affidavits, depositions, admissions, answers to interrogatories, and stipulations may be employed to supplement other documentary evidence in the Board record. The Board may permit such submissions to be supplemented by oral argument (transcribed if requested), and by briefs arranged in accordance with Rule 23.

### 12. Optional SMALL CLAIMS (EXPEDITED) and ACCELERATED Procedures

These procedures are available solely at the election of the appellant.

#### 12.1 Elections to Utilize SMALL CLAIMS (EXPEDITED) and ACCELERATED Procedures

(a) In appeals where the amount in dispute is \$50,000 or less, the appellant may elect to have the appeal processed under a SMALL CLAIMS (EXPEDITED) procedure requiring decision of the appeal, whenever possible, within 120 days after the Board receives written notice of the appellant's election to utilize this procedure. The details of this procedure appear in section 12.2 of this Rule. An appellant may elect the ACCELERATED procedure rather than the SMALL CLAIMS (EXPEDITED) procedure for any appeal eligible for the SMALL CLAIMS (EXPEDITED) procedure.

(b) In appeals where the amount in dispute is \$50,000 or less, the appellant may elect to have the appeal processed under an ACCELERATED procedure requiring decision of the appeal, whenever possible, within 180 days after the Board receives written notice of the appellant's election to utilize this procedure. The details of this procedure appear in section 12.3 of this Rule.

(c) The appellant shall file a written election to utilize the SMALL CLAIMS (EXPEDITED) or ACCELERATED procedure within 60 days after the date of the Board's decision on the merits of the appeal, unless such period is extended by the Board for good cause. The election may not be withdrawn except with permission of the Board and for good cause.





## ARMED SERVICES BOARD OF CONTRACT APPEALS

## 12.2 The SMALL CLAIMS (EXPEDITED) Procedure

(a) In cases proceeding under the SMALL CLAIMS (EXPEDITED) procedure, the following time periods shall apply:

(1) Within 10 days from the Government's receipt from either the appellant or the Board of a copy of the appellant's notice of election of the SMALL CLAIMS (EXPEDITED) procedure, the Government shall send the Board a copy of the contract, the contracting officer's final decision, and the appellant's claim letter or letters, if any; remaining documents required under Rule 4 shall be submitted in accordance with times specified in that rule unless the Board otherwise directs.

(2) Within 10 days after the Board has assigned an administrative judge, the assigned administrative judge shall take the following actions, if feasible, in an informal meeting or a telephone conference with both parties: (i) identify and simplify the issues; (ii) establish a simplified procedure appropriate to the particular appeal involved; (iii) determine whether either party wants a hearing, and if so, fix a time and place therefor; (iv) require the Government to furnish all the additional documents relevant to the appeal; and (v) establish an expedited schedule for resolution of the appeal.

(b) Pleadings, discovery, and other prehearing activity will be allowed only as consistent with the requirement to conduct the hearing on the date scheduled, or if no hearing is scheduled, to close the record on a date that will allow decisions within the 120-day limit. The Board, in its discretion, may impose shortened time periods for any actions prescribed or allowed under these rules, as necessary to enable the Board to decide the appeal within the 120-day limit, allowing whatever time, up to 30 days, that the Board considers necessary for the preparation of the decision after closing the record and the filing of briefs, if any.

(c) Within 120 days of the decision by the Board in cases proceeding under the SMALL CLAIMS (EXPEDITED) procedure will be summary findings of fact and conclusions. Decisions will be rendered for the Board by a single administrative judge. If there has been a hearing, the administrative judge presiding at the hearing may, in the judge's discretion, at the conclusion of the hearing and after entertaining such



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oral arguments as deemed appropriate, render on the record oral summary findings of fact, conclusions, and a decision of the appeal. Whenever such an oral decision is rendered, the Board will subsequently furnish the parties a typed copy of such oral decision for record and payment purposes and to establish the starting date for the period for filing a motion for reconsideration under Rule 29.

(d) A decision against the Government or the contractor shall have no value as precedent, and in the absence of fraud shall be final and conclusive and may not be appealed or set aside.

**12.3 ACCELERATED Procedure**

(a) ~~ACCELERATED procedure shall be used in cases where the amount in dispute is \$10,000 or less and the appellant elects the accelerated procedure.~~

The Board, in its discretion, may shorten time periods prescribed or allowed elsewhere in these Rules, including Rule 4, as necessary to enable the Board to decide the appeal within 180 days after the Board has received the appellant's notice of election of the ACCELERATED procedure, and may reserve 30 days for preparation of the decision.

(b) ~~Written decision by the Board in cases processed under the ACCELERATED procedure will normally be short and contain only summary findings of fact and conclusions.~~ Decisions will be rendered for the Board by a single administrative judge with the concurrence of a vice chairman, or by a majority among these two and the chairman in case of disagreement. Alternatively, in cases where the amount in dispute is \$10,000 or less as to which the ACCELERATED procedure has been elected and in which there has been a hearing, the single administrative judge presiding at the hearing may, with the concurrence of both parties, at the conclusion of the hearing and after entertaining such oral arguments as deemed appropriate, render on the record oral summary findings of fact, conclusions, and a decision of the appeal. Whenever such an oral decision is rendered, the Board will subsequently furnish the parties a typed copy of such oral decision for record and payment purposes, and to establish the starting date for the period for filing a motion for reconsideration under Rule 29.





**ARMED SERVICES BOARD OF CONTRACT APPEALS****12.4 Motions for Reconsideration in Rule 12 Cases**

Motions for Reconsideration of cases decided under either the SMALL CLAIMS (EXPEDITED) procedure or the ACCELERATED procedure need not be decided within the original 120-day or 180-day limit, but all such motions shall be processed and decided rapidly so as to fulfill the intent of this Rule.

**13. Settling the Record**

(a) The record upon which the Board's decision will be rendered consists of the documents furnished under Rules 4 and 12, to the extent admitted in evidence, and the following items, if any: pleadings, prehearing conference memoranda or orders, prehearing briefs, depositions or interrogatories received in evidence, admissions, stipulations, transcripts of conferences and hearings, hearing exhibits, post-hearing briefs, and documents which the Board has specifically designated be made a part of the record. The record will, at all reasonable times, be available for inspection by the parties at the office of the Board.

(b) Except as the Board may otherwise order in its discretion, no proof shall be received in evidence after completion of an oral hearing or, in cases submitted on the record, after notification by the Board that the case is ready for decision.

(c) The weight to be attached to any evidence of record will rest within the sound discretion of the Board. The Board may in any case require either party, with appropriate notice to the other party, to submit additional evidence on any matter relevant to the appeal.

**Discovery - Depositions**

(a) *General Policy and Protective Orders* - The parties are encouraged to engage in voluntary discovery procedures. In connection with any deposition or other discovery procedure, the Board may make any order required to protect a party or person from annoyance, embarrassment, or undue burden or expense. Those orders may include limitations on the scope, method, time and place for discovery, and provisions for protecting the secrecy of confidential information or documents.





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(b) *When Depositions Permitted* - After an appeal has been docketed and complaint filed, the parties may mutually agree to, or the Board may, upon application of either party, order the taking of testimony of any person by deposition upon oral examination or written interrogatories before any officer authorized to administer oaths at the place of examination, for use as evidence or for purpose of discovery. The application for order shall specify whether the purpose of the deposition is discovery or for use as evidence.

(c) *Orders on Depositions* - The time, place, and manner of taking depositions shall be as mutually agreed by the parties, or failing such agreement, governed by order of the Board.

(d) *Use as Evidence* - No testimony taken by depositions shall be considered as part of the evidence in the hearing of an appeal until such testimony is offered and received in evidence at such hearing. It will not ordinarily be received in evidence if the deponent is present and can testify at the hearing. In such instances, however, the deposition may be used to contradict or impeach the testimony of the deponent given at the hearing. In cases submitted on the record, the Board may, in its discretion, receive depositions to supplement the record.

(e) *Expenses* - Each party shall bear its own expenses associated with the taking of any deposition.

(f) *Subpoenas* - Where appropriate, a party may request the issuance of a subpoena under the provisions of Rule 21.

~~It is the policy of the Board to encourage the parties to resolve their disputes by mutual agreement and to avoid the need for the Board's intervention.~~

After an appeal has been docketed and complaint filed with the Board, a party may serve on the other party:

(a) written interrogatories to be answered separately in writing, signed under oath and answered or objected to within 45 days after service; (b) a request for the admission of specified facts and/or the authenticity of any documents, to be answered or objected to within 45 days after service; the factual statements and the authenticity of the documents to be deemed admitted upon failure of a party to respond to the request; and (c) a request for the production, inspection and



**ARMED SERVICES BOARD OF CONTRACT APPEALS**

copying of any documents or objects not privileged, which reasonably may lead to the discovery of admissible evidence, to be answered or objected to within 45 days after service. The Board may allow a shorter or longer time. Any discovery engaged in under this Rule shall be subject to the provisions of Rule 14(a) with respect to general policy and protective orders, and of Rule 35 with respect to sanctions.

**16. Service of Papers Other Than Subpoenas**

Papers shall be served personally or by mail, addressed to the party upon whom service is to be made. Copies of complaints, answers and briefs shall be filed directly with the Board. The party filing any other paper with the Board shall send a copy thereof to the opposing party, noting on the paper filed with the Board that a copy has been so furnished. Subpoenas shall be served as provided in Rule 21.

**HEARINGS****17. Where and When Held**

Hearings will be held at such places determined by the Board to best serve the interests of the parties and the Board. Hearings will be scheduled at the discretion of the Board with due consideration to the regular order of appeals, Rule 12 requirements, and other pertinent factors. On request or motion by either party and for good cause, the Board may, in its discretion, adjust the date of a hearing.

**18. Notice of Hearings**

The parties shall be given at least 15 days notice of the time and place set for hearings. In scheduling hearings, the Board will consider the desires of the parties and the requirement for just and inexpensive determination of appeals without unnecessary delay. Notices of hearings shall be promptly acknowledged by the parties.

**19. Unexcused Absence of a Party**

The unexcused absence of a party at the time and place set for hearing will not be occasion for delay. In the event of such absence, the hearing will proceed and the case will be regarded as submitted by the absent party as provided in Rule 11.





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20. Hearings: Nature, Examination of Witnesses

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\_\_\_\_\_ the sound discretion of the presiding administrative judge or examiner. Stipulations of fact agreed upon by the parties may be regarded and used as evidence at the hearing. The parties may stipulate the testimony that would be given by a witness if the witness were present. The Board may require evidence in addition to that offered by the parties.

(b) *Examination of Witnesses* - Witnesses before the Board will be examined orally under oath or affirmation, unless the presiding administrative judge or examiner shall otherwise order. If the testimony of a witness is not given under oath, the Board may advise the witness that his statements may be subject to the provisions of Title 18, United States Code, sections 287 and 1001, and any other provision of law imposing penalties for knowingly making false representations in connection with claims against the United States or in any matter within the jurisdiction of any department or agency thereof.

21. Subpoenas

~~(a) General - Upon written request of either party filed with the recorder or on his own initiative, the administrative judge to whom a case is assigned or who is otherwise designated by the chairman may issue a subpoena requiring:~~

- (i) testimony at a deposition - the deposing of a witness in the city or county where he resides or is employed or transacts his business in person, or at another location convenient for him that is specifically determined by the Board;
- (ii) testimony at a hearing - the attendance of a witness for the purpose of taking testimony at a hearing; and





## ARMED SERVICES BOARD OF CONTRACT APPEALS

- (iii) production of books and papers - in addition to (i) or (ii), the production by the witness at the deposition or hearing of books and papers designated in the subpoena.

(b) *Voluntary Cooperation* - Each party is expected (i) to cooperate and make available witnesses and evidence under its control as requested by the other party, without issuance of a subpoena, and (ii) to secure voluntary attendance of desired third-party witnesses and production of desired third-party books, papers, documents, or tangible things whenever possible.

(c) *Requests for Subpoenas* -

(1) A request for subpoena shall normally be filed at least:

- (i) 15 days before a scheduled deposition where the attendance of a witness at a deposition is sought; or
- (ii) 30 days before a scheduled hearing where the attendance of a witness at a hearing is sought.

In its discretion the Board may honor requests for subpoenas not made within these time limitations.

(2) A request for a subpoena shall state the reasonable scope and general relevance to the case of the testimony and of any books and papers sought.

(d) *Requests to Quash or Modify* - Upon written request by the person subpoenaed or by a party, made within 10 days after service but in any event not later than the time specified in the subpoena for compliance, the Board may (i) quash or modify the subpoena if it is unreasonable and oppressive or for other good cause shown, or (ii) require the person in whose behalf the subpoena was issued to advance the reasonable cost of producing subpoenaed books and papers. Where circumstances require, the Board may act upon such a request at any time after a copy has been served upon the opposing party.



**ARMED SERVICES BOARD OF CONTRACT APPEALS****(e) Form; Issuance -**

(1) Every subpoena shall state the name of the Board and the title of the appeal, and shall command each person to whom it is directed to attend and give testimony, and if appropriate, to produce specified books and papers at a time and place therein specified. In issuing a subpoena to a requesting party, the administrative judge shall sign the subpoena and may, in his discretion, enter the name of the witness and otherwise leave it blank. The party to whom the subpoena is issued shall complete the subpoena before service.

(2) Where the witness is located in a foreign country, a letter rogatory or subpoena may be issued and served under the circumstances and in the manner provided in 28 U.S.C. 1781-1784.

**(f) Service -**

(1) The party requesting issuance of a subpoena shall arrange for service.

(2) A subpoena requiring the attendance of a witness at a deposition or hearing may be served at any place. A subpoena may be served by a United States marshal or deputy marshal, or by any other person who is not a party and not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by personally delivering a copy to that person and tendering the fees for one day's attendance and the mileage provided by 28 U.S.C. 1821 or other applicable law; however, where the subpoena is issued on behalf of the Government, money payments need not be tendered in advance of attendance.

(3) The party at whose instance a subpoena is issued shall be responsible for the payment of fees and mileage of the witness and of the officer who serves the subpoena. The failure to make payment of such charges on demand may be deemed by the Board as a sufficient ground for striking the testimony of the witness and the books or papers the witness has produced.



**ARMED SERVICES BOARD OF CONTRACT APPEALS**

(g) *Contumacy or Refusal to Obey a Subpoena* - In case of contumacy or refusal to obey a subpoena by a person who resides, is found, or transacts business within the jurisdiction of a United States District Court, the Board will apply to the Court through the Attorney General of the United States for an order requiring the person to appear before the Board or a member thereof to give testimony or produce evidence or both. Any failure of any such person to obey the order of the Court may be punished by the Court as a contempt thereof.

**22. Copies of Papers**

When books, records, papers, or documents have been received in evidence, a true copy thereof or of such part thereof as may be material or relevant may be substituted therefor, during the hearing or at the conclusion thereof.

**23. Post-Hearing Briefs**

Post-hearing briefs may be submitted upon such terms as may be directed by the presiding administrative judge or examiner at the conclusion of the hearing.

**24. Transcript of Proceedings**

Testimony and argument at hearings shall be reported verbatim, unless the Board otherwise orders. Waiver of transcript may be especially suitable for hearings under Rule 12.2. Transcripts of the proceedings shall be supplied to the parties at such rates as may be established by contract between the Board and the reporter, provided that ordinary copy of transcript shall be supplied to the appellant at an amount no greater than the cost of duplication.

**25. Withdrawal of Exhibits**

After a decision has become final the Board may, upon request and after notice to the other party, in its discretion permit the withdrawal of original exhibits, or any part thereof, by the party entitled thereto. The substitution of true copies of exhibits or any part thereof may be required by the Board in its discretion as a condition of granting permission for such withdrawal.





**ARMED SERVICES BOARD OF CONTRACT APPEALS****REPRESENTATION****26. The Appellant**

An individual appellant may appear before the Board in person, a corporation by one of its officers; and a partnership or joint venture by one of its members; or any of these by an attorney at law duly licensed in any state, commonwealth, territory, the District of Columbia, or in a foreign country. An attorney representing an appellant shall file a written notice of appearance with the Board.

**27. The Government**

Government counsel may, in accordance with their authority, represent the interest of the Government before the Board. They shall file notices of appearance with the Board, and notice thereof will be given appellant or appellant's attorney in the form specified by the Board from time to time.

**DECISIONS****28. Decisions**

(a) Decisions of the Board will be made in writing and authenticated copies of the decision will be forwarded simultaneously to both parties. The rules of the Board and all final orders and decisions (except those required for good cause to be held confidential and not cited as precedents) shall be open for public inspection at the offices of the Board. Decisions of the Board will be made solely upon the record, as described in Rule 13.

(b) Any monetary award to a contractor by the Board shall be promptly paid in accordance with the procedures provided by section 1302 of the Act of July 27, 1956 (70 Stat. 694, as amended; 31 U.S.C. 724a). To assure prompt payment the Recorder will forward a waiver form to each party with the decision. If the parties do not contemplate an appeal or motion for reconsideration, they will execute waivers which so state, and return them to the Recorder. The Recorder will forward the waivers and a certified copy of the award decision to the General Accounting Office for certification for payment.



**ARMED SERVICES BOARD OF CONTRACT APPEALS****MOTION FOR RECONSIDERATION****29. Motion for Reconsideration**

A motion for reconsideration may be filed by either party. It shall set forth specifically the grounds relied upon to sustain the motion. The motion shall be filed within 30 days from the date of the receipt of a copy of the decision of the Board by the party filing the motion.

**SUSPENSIONS, DISMISSALS AND DEFAULTS: REMANDS****30. Suspensions; Dismissal Without Prejudice**

The Board may suspend the proceedings by agreement of counsel for settlement discussions, or for good cause shown. In certain cases, appeals docketed before the Board are required to be placed in a suspense status and the Board is unable to proceed with disposition thereof for reasons not within the control of the Board. Where the suspension has continued, or may continue, for an inordinate length of time, the Board may, in its discretion, dismiss such appeals from its docket without prejudice to their restoration when the cause of suspension has been removed. Unless either party or the Board acts within three years to reinstate any appeal dismissed without prejudice, the dismissal shall be deemed with prejudice.

**31. Dismissal or Default for Failure to Prosecute or Defend**

Whenever a record discloses the failure of either party to file documents required by these rules, respond to notices or correspondence from the Board, comply with orders of the Board, or otherwise indicates an intention not to continue the prosecution or defense of an appeal, the Board may, in the case of a default by the appellant, issue an order to show cause why the appeal should not be dismissed or, in the case of a default by the Government, issue an order to show cause why the Board should not act thereon pursuant to Rule 35. If good cause is not shown, the Board may take appropriate action.



**ARMED SERVICES BOARD OF CONTRACT APPEALS****32. Remand from Court**

Whenever any court remands a case to the Board for further proceedings, each of the parties shall, within 20 days of such remand, submit a report to the Board recommending procedures to be followed so as to comply with the court's order. The Board shall consider the reports and enter special orders governing the handling of the remanded case. To the extent the court's directive and time limitations permit, such orders shall conform to these rules.

**TIME, COMPUTATION AND EXTENSIONS****33. Time, Computation and Extensions**

(a) Where possible, procedural actions should be taken in less time than the maximum time allowed. Where appropriate and justified, however, extensions of time will be granted. All requests for extensions of time shall be in writing.

(b) In computing any period of time, the day of the event from which the designated period of time begins to run shall not be included, but the last day of the period shall be included unless it is a Saturday, Sunday, or a legal holiday, in which event the period shall run to the end of the next business day.

**EX PARTE COMMUNICATIONS****34. Ex parte Communications**

No member of the Board or of the Board's staff shall entertain, nor shall any person directly or indirectly involved in an appeal, submit to the Board or the Board's staff, off the record, any evidence, explanation, analysis, or advice, whether written or oral, regarding any matter at issue in an appeal. This provision does not apply to consultation among Board members or to ex parte communications concerning the Board's administrative functions or procedures.





**ARMED SERVICES BOARD OF CONTRACT APPEALS****SANCTIONS****35. Sanctions**

If any party fails or refuses to obey an order issued by the Board, the Board may then make such order as it considers necessary to the just and expeditious conduct of the appeal.

**EFFECTIVE DATE AND APPLICABILITY****36. Effective Date**

These rules shall apply (i) mandatorily, to all appeals relating to contracts entered into on or after 1 March 1979, and (ii) at the contractor's election, to appeals relating to earlier contracts, with respect to claims pending before the contracting officer on 1 March 1979 or initiated thereafter.



**ARMED SERVICES BOARD OF CONTRACT APPEALS**

Pursuant to the Charter of the Armed Services Board of Contract Appeals, the attached rules are hereby approved for use and application to appeals to the Armed Services Board of Contract Appeals under the Contract Disputes Act of 1978.

(signed) WILLIAM J. PERRY (30 JUN 1980)  
UNDER SECRETARY OF DEFENSE FOR  
RESEARCH AND ENGINEERING

(signed) PERCY A. PIERRE  
ASSISTANT SECRETARY OF THE ARMY  
(RESEARCH, DEVELOPMENT AND  
ACQUISITION)

(signed) J. A. DOYLE  
ASSISTANT SECRETARY OF THE NAVY  
(MANPOWER, RESERVE AFFAIRS AND  
LOGISTICS)

(signed) EUGENE H. KOPF  
(ACTING) ASSISTANT SECRETARY OF THE AIR FORCE  
(RESEARCH, DEVELOPMENT AND  
LOGISTICS)

**DOD FAR SUPPLEMENT**



APPENDIX 2

SECRETARY OF THE NAVY

MEMORANDUM ON

ALTERNATIVE DISPUTE RESOLUTION IN THE U.S. NAVY







THE SECRETARY OF THE NAVY  
WASHINGTON, D. C. 20350

23 December 1986

MEMORANDUM FOR THE CHIEF OF NAVAL OPERATIONS  
THE COMMANDANT OF THE MARINE CORPS  
THE ASSISTANT SECRETARY OF THE NAVY (RE&S)  
THE ASSISTANT SECRETARY OF THE NAVY (FM)  
THE ASSISTANT SECRETARY OF THE NAVY (S&L)  
THE ASSISTANT SECRETARY OF THE NAVY (M&RA)  
THE GENERAL COUNSEL OF THE NAVY ←

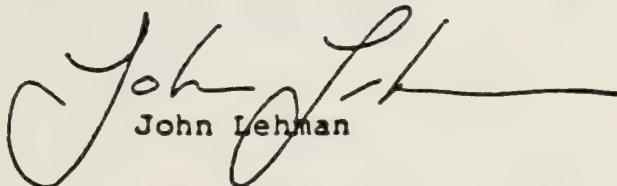
Subject: The Department of the Navy Alternative Disputes  
Resolution Program

The Navy has experienced an explosion in many areas of its litigation over the past five years, including a 100% increase in contract disputes before the Armed Services Board of Contract Appeals (ASBCA). We must explore alternative methods of resolving cases in litigation which both efficiently use scarce resources and adequately protect the Navy's interests. At the same time, every reasonable step must be taken to resolve disputes prior to litigation.

Attached are procedures for an Alternative Disputes Resolution (ADR) Program. It describes several ADR techniques including the mini-trial, an abbreviated trial-like procedure before business officials of the Navy and the contractor. I believe that techniques such as these bear great promise in contract disputes resolution and should be tested throughout the Navy acquisition community. While they are oriented to litigation, they may also be helpful in resolving pre-litigation disputes.

Accordingly, for the next year, and under the guidance and control of the General Counsel, this program will be implemented as a test by all Navy activities who contract with the private sector. Each contract dispute now pending and those filed during this test period will be reviewed and ADR techniques used if reasonable. At the conclusion of the test, the General Counsel will assess and report on the test results.

Finally, all Navy activities must ensure that appropriate management review is being made of proposed contracting officer's final decisions and that appropriate steps are being taken to resolve contract disputes before such decisions are issued. When reasonable management efforts are unsuccessful in achieving a resolution of a dispute, we will engage in litigation.

  
John Lehman

Atts.



DEPARTMENT OF THE NAVY  
ALTERNATIVE DISPUTES RESOLUTION  
PROCEDURES

I. PURPOSE. This document contains guidance for the use of Alternative Disputes Resolution techniques (ADR) for the resolution of contract disputes before the Armed Services Board of Contract Appeals (ASBCA).

II. APPLICABILITY. These procedures apply to all Department of the Navy components processing contract appeals before the ASBCA.

III. POLICY. It is the policy of the Department of the Navy to utilize ADR in every appropriate case. The approval of the General Counsel of the Navy or his designee must be obtained before the Navy agrees to utilize ADR with regard to any particular case.

IV. DISCUSSION.

A. In General. ADR techniques (for instance, mini-trials) facilitate resolution of disputes faster and cheaper than is possible with litigation. They provide a framework within which sufficient information can be presented to enable the parties to make reasoned judgments regarding resolution of a dispute. These techniques may be adapted to the peculiar requirements of a particular case or cases. Their use is voluntary, and, if unsuccessful, the underlying litigation can be resumed. Not every ADR effort will be successful. However, when used judiciously both in the private sector and in several Government agencies, a variety of disputes have been efficiently resolved.

B. Case Selection.

1. Generally. An important initial determination is whether the information likely to be developed using ADR will be sufficient for the parties to reevaluate their positions and to resolve the dispute. The decision to proceed with ADR is a business decision, which must take into account relevant legal considerations. The fact that resolution of a dispute involves legal issues such as contract interpretation does not necessarily eliminate that case from consideration. Similarly, the amount in dispute is a relevant factor to use but should not solely control the decision.





2. Types of Cases. The best candidates for ADR treatment are those cases in which only facts are in dispute, while the most difficult are those in which disputed law is applied to uncontroverted facts. Two types of cases have generally proven to be poor candidates: those involving disputes controlled by clear legal precedent, making compromise difficult, and those whose resolution will have a significant impact on other pending cases or on the future conduct of the Navy's business. In these cases, the value of an authoritative decision on the merits will usually outweigh the short-term benefits of a speedy resolution by ADR.

3. Responsibilities. The responsibility for identifying candidate cases lies not only with the assigned Navy trial counsel as part of the periodic review of the status of on-going litigation, but also with the cognizant officials of the Navy activity from which contract disputes originate. Once these officials and the contractor are in accord regarding use of ADR in a given case, the recommendation to proceed should be forwarded to the General Counsel of the Navy or his designee for approval.

#### C. Examples of ADR Techniques.

1. The Mini-Trial. The mini-trial brings together an official from each contracting party with authority to resolve the dispute (the "principals") to hear evidentiary presentations from a representative of each party (usually, the trial counsel) and thereafter to discuss resolution of the dispute. While the mini-trial will be tailored to the particular requirements of a given case, each mini-trial will be governed by a written agreement between the parties, an example of which is attached as Attachment 1.

(a) The mini-trial stages. The mini-trial has three distinct stages, all of which can usually be completed within 90 days.

(i). The pre-hearing stage. This stage covers the time between agreement on written mini-trial procedures and commencement of the mini-trial hearing. During this stage, the parties will complete whatever preparatory activities (such as discovery and exchange of position papers) are permitted by the agreement. This stage will consume the bulk of the time to complete the mini-trial.

(ii). The hearing stage. In this stage, the representatives will present their respective positions to the principals. Each representative will be given a specific amount of time within which to make this presentation, and how that time is utilized is solely at the discretion of the





representative. Mini-trial agreements also can provide for rebuttal presentations and for a question and answer period for the principals. In most cases, this stage should take 1-3 days.

(iii). Post-hearing discussions stage. In this stage, the principals will meet to discuss resolution of the dispute. The mini-trial agreement should establish a time limit within which the principals either agree to resolve the dispute or agree that the underlying litigation should be resumed.

(b). The neutral advisor. A mini-trial agreement may provide for the services of a neutral advisor, who is an impartial third party experienced in government contract law and, preferably, in litigation as well. There is no requirement to have such an advisor, and, in fact, in the smaller, less complex cases, the need for a neutral advisor will be the exception. The neutral advisor shall provide such services as are delineated in the mini-trial agreement and in the specific agreement between the neutral advisor and the parties.

The best source of neutral advisors is the ASBCA. During the negotiation of a mini-trial agreement, if the use of a neutral advisor is contemplated, the parties should attempt to agree on a list of ASBCA judges who would be mutually acceptable. Thereafter, the General Counsel or his designee will submit that list and the agreed-upon schedule for the mini-trial to the Chairman of the ASBCA along with a request that one of the listed judges be detailed to serve as the neutral advisor in the mini-trial proceedings.

If this effort is unsuccessful, then the Navy could agree to seek a neutral advisor from the private sector. Such an advisor, in addition to the qualifications and limitations noted above, and in the absence of special circumstances, shall not be anyone who is presently representing the contractor in a dispute against the Navy (such as an attorney in private practice). Sources of private sector neutral advisors include retired Trial Commissioners of the U.S. Court of Claims, retired Judges of the U.S. Claims Court and present or retired members of law school faculties.

(c). Other participants. In general, the only participants in the mini-trial will be the principals, their representatives, the neutral advisor (if any) and any witnesses to be called by either party at the hearing. In a case where there are substantial legal issues, the mini-trial agreement should permit the presence and participation of in-house non-litigation counsel for each of the principals.



(d). Other factors. Several other factors should be considered during the negotiation of a mini-trial agreement:

(i). Neither mini-trial principal should have had responsibility either for preparing the claim (in the case of the contractor) or for denying that claim (in the case of the Navy).

(ii). The Navy's principal must have contracting officer authority sufficient for the amount in dispute.

(iii). The agreement shall provide that the post-hearing discussions shall not be used by either party in subsequent litigation as an admission of liability or as an indication of willingness to agree on any aspects of settlement.

(iv). Because a legal memorandum must be prepared to support any resolution resulting from a mini-trial, the Navy principal must have the right to consult with nonlitigation in-house counsel prior to a final agreement on resolution of a dispute.

## 2. Other techniques.

(a). Generally. While the mini-trial will be the basic technique most commonly used in resolving contract disputes outside the traditional litigation context, its description in the preceding section does not necessarily limit other approaches. Further, while it is the linchpin of a structured settlement process, imaginative adjustments to the litigation process at the ASBCA could also be a valuable tool for the parties to resolve disputes at a substantial savings of time and dollars.

(b). Summary binding ASBCA procedure. It may not be economical for a Navy activity involved in a large number of small dollar contract claims to focus any formal ADR technique on the resolution of a single such dispute. However, such may not be the case if a number of those disputes could be handled either together or sequentially in a brief period of time. One way this could occur is to employ a summary procedure before the ASBCA. Such a procedure could have the following characteristics:

(i). The parties would agree to submit a joint motion to the ASBCA to permit the case to be processed under summary procedures.

(ii). One element of this procedure is a





hearing at which the parties would be given a limited amount of time (for instance, one hour) to make a presentation to the ASBCA judge, and, for instance, half that time to rebut the other party's presentation. How that presentation would be structured would be at the sole discretion of each party's representative.

(iii). At the conclusion of these presentations, the judge would decide the case from the bench. The only document would be a binding order stating the judge's decision on the ultimate question whether the appeal is sustained or denied, and, if sustained, the amount awarded, if any.

(iv). The parties would agree to waive their respective rights to appeal under the Contract Disputes Act of 1978.

(v). An additional element of this procedure could be to limit the persons making the presentations to non-lawyers (for instance, the Navy contracting officer and his counterpart in the contractor's organization).

Under this suggested procedure, it would take half a day to decide one case, and if scheduled sequentially, several cases could be resolved in just a few days.

(c). Summary non-binding ASBCA procedure. A variation of the suggestion in (b) above is to substitute an advisory opinion from the ASBCA for the binding bench decision. In this situation, the judge might function much as a non-binding arbitrator, whose an advisory opinion might enhance resolution of the dispute.

(d). Other considerations.

(i). While the procedure in (c) above may not provide the likelihood of sufficient savings in resources when applied to a single case, a series of cases could be scheduled, some under (b) above and others under (c).

(ii). In the event several cases are scheduled for seriatim disposition under summary procedures, the General Counsel or his designee will submit to the Chairman of the ASBCA the motions noted in IV.C.2(b)(i) above and a request for the assignment of a judge or judges depending on the length of the schedule.





ATTACHMENT 1

AGREEMENT CONCERNING PROCEDURES  
FOR MINI-TRIAL  
IN ASBCA No. XXXXX

1. XYZ Corporation ("XYZ") and the Department of the Navy (the "Navy"), agree to exchange facts and legal positions and to engage in discussions relating to ASBCA No. XXXXX in accordance with the procedures set forth herein.

2. XYZ and the Navy agree that the purpose of these procedures is to facilitate resolution of the claim(s) at issue in ASBCA No. XXXXX without resort to further litigation.

3. The parties shall exchange their positions on the legal and factual issues involved, and the contractor shall provide all necessary financial documentation of each element of quantum, except to the extent the parties agree on the amounts of any or all of such elements.

4. XYZ and the Navy agree that trial counsel (the "representative") for each party shall make an oral presentation of such party's position with respect to the ASBCA No. XXXXX in a proceeding before a panel (the "mini-trial hearing"). The panel shall consist of a management official of each party (a "principal participant") with a neutral third party presiding (the "neutral advisor"). XYZ and the Navy further agree (a) that the mini-trial hearing will be preceded by a prehearing period, which may include the discovery as set forth in Paragraph 15 hereof, and the



exchange of exhibits (including documents), position papers and responses, and (b) that the mini-trial hearing will be followed by discussions. The parties will follow the schedule set forth in Exhibit A.

#### Principal Participants

5. \_\_\_\_\_ of XYZ and \_\_\_\_\_ of the Navy shall attend the mini-trial hearing and the settlement discussions as the principal participants. They shall review the respective positions on the facts and the law, including quantum, together with the supporting documentation. After the mini-trial hearing, they will enter into good faith discussions to resolve ASBCA No. XXXXX.

6. The principal participants shall have authority to settle the ASBCA No. XXXXX. The principal participants may consult with others during their discussions and before making a final commitment to a negotiated settlement.

7. The principal participants may ask any questions of the representatives and any other persons participating in the presentations to clarify their understanding of the matters being presented by them during the mini-trial hearing.

8. Each principal participant may be accompanied and advised by one in-house non-litigation counsel.





### Neutral Advisor

9. XYZ and the Navy jointly designate \_\_\_\_\_ as the neutral advisor.

10. The neutral advisor shall preside or serve as moderator at the mini-trial hearing. The neutral advisor may ask questions to seek clarification, but may not direct, limit or otherwise interfere with either representative's presentation or rebuttal, surrebuttal, or closing argument.

11. By agreement, the representatives may jointly seek the advice and assistance of the neutral advisor regarding any question or disagreement concerning these procedures or the Schedule. The representatives may also jointly discuss with the neutral advisor any administrative matters necessary to arrange or to facilitate the procedures set forth herein.

12. Unless the representatives mutually agree, there shall be no separate communication by either party with the neutral advisor on any matter relating to this Agreement at any time prior to final resolution of ASBCA No. XXXXX.

13. The neutral advisor shall not participate in any capacity for either party with respect to ASBCA No. XXXXX if the procedures set forth herein do not result in a final resolution, and neither party shall attempt to obtain any disclosure or





discovery from the neutral advisor in respect to the subject matter of ASBCA No. XXXXX or these proceedings.

14. The written agreement between the neutral advisor and the parties shall include agreements (a) that all information (including testimony) and documents received as a result of participating in this minitrial shall not be disclosed to any third party; (b) that all documents submitted, including copies of such documents, shall be returned to the submitting party and all notes prepared shall be destroyed within 10 days after this Agreement terminates; and (c) that the neutral advisor will abide by and comply with this Agreement.

#### Prehearing Procedures

15. All prehearing procedures shall be completed according to the Schedule attached hereto.

16. XYZ and the Navy agree to respond to any discovery requests from the other party (including written interrogatories, production of documents, and admissions). The scope of discovery shall be governed by Rule 26(b) of the Federal Rules of Civil Procedure.

17. Discovery undertaken pursuant to this Agreement shall not affect in any manner either party's access to information or right to discovery in ASBCA No. XXXXX (including, but not limited



to, its right to depose any person concerning any matter) in the event that these procedures do not result in a final agreement.

18. XYZ and the Navy further agree that the following procedures shall apply to discovery undertaken pursuant to this Agreement:

- (i) Either party may elect not to produce any information or document which it deems protected from disclosure by the attorney-client privilege, the work-product immunity, any governmental privilege, or any common law, statute, or regulation. As a general rule, this election will be made only under the most compelling circumstances.
- (ii) In the event either party determines to produce any information or document it deems protected for any reason set forth in subparagraph (i) above, it shall designate such information or document as "privileged". The requesting party agrees that production of such information or document shall not be deemed or constitute a waiver of any applicable protection against disclosure of such information or document for any purpose, except for the limited purpose of



this Agreement. The requesting party further agrees that it shall treat any information or document designated as "privileged" in accordance with subparagraphs (iii) and (iv) below.

(iii) XYZ and the Navy agree to limit disclosure of, any information or document, received by them respectively and designated as "privileged" by the other, to the persons necessary to assist the representatives or the principal participants, or both. No privileged document will be made part of or included in any file.

(iv) Any person receiving any information or document designated as "privileged" including, but not limited to, copies of documents or notes relating thereto, shall return such document within 10 days after this Agreement terminates.

19. The representatives shall exchange with each other, the principal participants, and the neutral advisor on the dates indicated in the Schedule (a) a position paper which shall not exceed \_\_ letter size, double-spaced pages in length, including all appendices and attachments, and (b) a response to the position paper of the other party which shall not exceed \_\_ letter size, doublespaced pages in length, including all appendices and





attachments.

20. The representatives shall exchange with each other, the principal participants and the neutral advisor a list of persons who will be present at and participate in their respective presentations.

### The Mini-trial Hearing

21. Each representative shall present his position to the principal participants and the neutral advisor on the dates and within the time limits set forth in the Schedule. Each representative may reserve for additional rebuttal any time in the Schedule set aside but not utilized for his initial presentation.

22. The representatives shall have complete discretion to structure their respective presentations and rebuttals which may include, but shall not be limited to, testimony by nonlawyers, audio visual aids, demonstrative evidence, and oral argument. The rules of evidence shall not apply. Neither representative may call persons employed by or otherwise in the control of the other party. The representatives may use deposition testimony of any such person in connection with his presentation.

23. No transcription, recording or other record shall be made of the presentation proceeding. The representatives,



in-house counsel, the neutral advisor and the principal participants may make notes during the mini-trial hearing with the understanding that such notes shall be destroyed within 10 days after this Agreement terminates.

24. During the times set aside for their respective rebuttals, each representative may ask questions of the other and of any person who participated in the other party's presentation, who shall remain available until excused. During the time set aside for questions and answers, the principal participants may ask questions of any person who participated in the presentations. Any time remaining after the principal participants' questions shall be divided equally between each representative for any further questions and answers.

#### Post-Hearing Procedures

25. After the mini-trial hearing, the principal participants and their in-house counsel shall meet at the times set forth in the Schedule to discuss their respective positions and the possible resolution of all matters relating to ASBCA No. XXXXX.

26. As part of their discussions, the principal participants at their discretion may request the neutral advisor to provide his views concerning the relative merits of the parties'





positions.

Future Use and Confidentiality of Statements and Documents

27. XYZ and the Navy agree that all offers, promises, conduct and statements, whether oral or written, made in connection with this Agreement or pursuant to the procedures set forth herein are part of a compromise negotiation, are confidential, shall not be admissible as evidence, and may not be used for any other purpose, including impeachment, in any other proceeding. XYZ and the Navy further agree that all documents and copies thereof submitted to each of them shall be returned to the submitting party, and all notes relating to the mini-trial proceedings shall be destroyed within 10 days after termination of this Agreement.

28. All documents, including, but not limited to, all position papers, responses, and writings of the neutral advisor and the principal participants, prepared in the course of the procedures set forth herein shall be inadmissible as evidence and may not be used for any other purpose, including impeachment, in any other proceeding.

29. Except for the documents described in Paragraph 28 hereof, any document presented by either party pursuant to these procedures to which there is otherwise any right to access or





which otherwise may be discovered pursuant to the Federal Rules of Civil Procedure and admitted in evidence pursuant to the Federal Rules of Evidence may be accessed, discovered or admitted in evidence in any other proceeding.

Termination of Agreement

30. XYZ and the Navy agree that this Agreement shall terminate if-

- (a) the parties reach a final agreement resolving all matters relating to ASBCA No. XXXXX;
- (b) the parties fail to reach a final agreement resolving all matters relating to ASBCA No. XXXXX by (give date);
- (c) either party notifies the other party in writing at any time that it desires to terminate the Agreement;

31. Notwithstanding Paragraph 30 hereof, Paragraphs 12-14, 18, and 27-29 shall remain in full force and effect.

Counsel for XYZ Corporation

Counsel for the Department  
of the Navy

\_\_\_\_\_  
Date: \_\_\_\_\_

\_\_\_\_\_  
Date: \_\_\_\_\_



**EXHIBIT A**  
**MINI-TRIAL SCHEDULE**

<b>Day</b>	<b>1</b>	Discovery requests served
	<b>6</b>	Representatives discuss discovery schedule, objections, and confidentiality requirements
	<b>30</b>	Complete discovery
	<b>40</b>	Exchange any proposed stipulations
	<b>54</b>	Meet to agree to fact and quantum stipulations
	<b>59</b>	Exchange position papers, witness lists, and exhibits
	<b>73</b>	Exchange rebuttal papers and rebuttal exhibits
	<b>78</b>	Meet with neutral advisor to resolve any procedural issues
	<b>83</b>	Mini-trial hearing Location: _____

<u>8:30-9:00</u>	Principals, representatives, and neutral advisor meet to review ground rules
<u>9:00-10:30</u>	Contractor presentation
<u>10:30-10:45</u>	Break
<u>10:45-11:45</u>	Contractor presentation (cont'd)
<u>11:45-1:00</u>	Lunch
<u>1:00-2:30</u>	Navy presentation
<u>2:30-2:45</u>	Break
<u>2:45-3:45</u>	Navy presentation (cont'd)



Day 84

9:00-10:15 Contractor rebuttal

10:30-12:15 Navy rebuttal and  
closing argument

12:30-1:00 Contractor surre-  
buttal and closing argument

1:00-2:00 Lunch

2:00-3:45 Open Q&A session

3:45-???? Discussions between  
principals

8:00-???? Further discussions  
between principals, if needed

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# ARMED SERVICES BOARD OF CONTRACT APPEALS

SKYLINE SIX

5109 LEESBURG PIKE

FALLS CHURCH VIRGINIA 22041-3208

## NOTICE REGARDING ALTERNATIVE METHODS OF DISPUTE RESOLUTION



The Contract Disputes Act of 1978, 41 U.S.C. § 607, states that boards of contract appeals "shall provide to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes." Resolution of a dispute at the earliest stage feasible, by the fastest and least expensive method possible, benefits both parties. To that end, the Board suggests that the parties consider Alternative Disputes Resolution (ADR) procedures.

The ADR methods described in this Notice are intended to suggest techniques which have worked in the past. Any method which brings the parties together in settlement, or partial settlement, of their dispute is a good method. The ADR methods listed are not intended to preclude the parties' use of other ADR techniques which do not require the Board's participation, such as settlement negotiations, fact-finding conferences or procedures, mediation, or minitrials not involving use of the Board's personnel. The ADR methods described below are designed to supplement existing "extrajudicial" settlement techniques, not to replace them. Any method, or combination of methods, including one which will result in a binding decision, may be selected by the parties without regard to the dollar amount in dispute.

Requests to the Board to utilize ADR procedures must be made jointly by the parties. If an ADR method involving the Board's participation is requested by the parties, the presiding administrative judge or member of the Board's legal staff will forward the request to the Board's Chairman for consideration. Unilateral requests or motions seeking ADR will not be considered. The presiding administrative judge or member of the Board's legal staff may also schedule a conference to explore the desirability and selection of an ADR method. If a non-binding ADR method involving the Board's participation is requested and approved by the Chairman, a settlement judge or a neutral advisor will be appointed. Usually the person appointed will be an administrative judge or hearing examiner employed by the Board.

If a non-binding ADR method fails to resolve the dispute, the appeal will be restored to the active docket for processing under the Board's Rules. To facilitate full, frank and open discussion and presentations, any settlement judge or neutral advisor who had participated in a non-binding ADR procedure which has failed to resolve the underlying dispute will ordinarily not participate in the restored appeal. Further, the judge or advisor will not discuss the merits of the appeal or substantive matters involved in the ADR proceedings with other Board personnel. Unless the parties explicitly request to the contrary, and such request is approved by the Chairman, the assigned ADR settlement judge or neutral advisor will be recused from consideration of the restored appeal.

Written material prepared specifically for use in an ADR proceeding, oral presentations made at an ADR proceeding, and all discussions in connection with such proceedings between representatives of the parties and a settlement judge or a neutral advisor are confidential and, unless otherwise specifically agreed by the parties, inadmissible as evidence in any pending or future Board proceeding involving the parties or matter in dispute. However, evidence otherwise admissible before the Board is not rendered inadmissible because of its use in an ADR proceeding.

Guidelines, procedures, and requirements implementing the ADR method selected will be prescribed by agreement of the parties and the settlement judge or neutral advisor. ADR methods can be used successfully at any stage of the litigation. Adoption of an ADR method as early in the appeal process as feasible will eliminate substantial cost and delay. Generally, ADR proceedings will be concluded within 120 days following approval of their use by the Chairman.



The following ADR methods are consensual and voluntary. Both parties and the Board must agree to use of any of these methods. The summary trial method requires that the parties agree to be bound by the decision.

1. Settlement Judge: A "settlement judge" is an administrative judge or hearing examiner who will not hear or have any formal or informal decision-making authority in the appeal and who is appointed for the purpose of facilitating settlement. In many circumstances, settlement can be fostered by a frank, in-depth discussion of the strengths and weaknesses of each party's position with a settlement judge. The agenda for meeting with the settlement judge will be flexible to accommodate the requirements of the individual appeal. To further the settlement effort, the settlement judge may meet with the parties either jointly or individually. Settlement judges' recommendations are not binding on the parties.

2. Minitrial: The minitrial is a highly flexible, expedited, but structured, procedure where each party presents an abbreviated version of its position to principals of the parties who have full contractual authority to conclude a settlement and to a Board-appointed neutral advisor. The parties determine the form of presentation without regard to customary judicial proceedings and rules of evidence. Principals and the neutral advisor participate during the presentation of evidence as provided in their advance agreement on procedure. Upon conclusion of these presentations, settlement negotiations are conducted. The neutral advisor may assist the parties in negotiating a settlement. The procedures for each minitrial will be designed to meet the needs of the individual appeal. Neutral advisors' recommendations are not binding on the parties.

3. Summary Trial with Binding Decision: A summary trial with binding decision is a procedure whereby the scheduling of the appeal is expedited and the parties try their appeal informally before an administrative judge or panel of judges. A summary "bench" decision generally will be issued upon conclusion of the trial or a summary written decision will be issued no later than ten days following the later of conclusion of the trial or receipt of a trial transcript. The parties must agree that all decisions, rulings, and orders by the Board under this method shall be final, conclusive, not appealable, and may not be set aside, except for fraud. All such decisions, rulings, and orders will have no precedential value. The length of trial and the extent to which scheduling of the appeal is expedited will be tailored to the needs of each particular appeal. Pretrial, trial, and post-trial procedures and rules applicable to appeals generally will be modified or eliminated to expedite resolution of the appeal.

4. Other Agreed Methods: The parties and the Board may agree upon other informal methods which are structured and tailored to suit the requirements of the individual appeal.

The above-listed ADR procedures are intended to shorten and simplify the Board's more formalized procedures. Generally, if the parties resolve their dispute by agreement, they benefit in terms of cost and time savings and maintenance or restoration of amicable relations. The Board will not view the parties' participation in ADR proceedings as a sign of weakness. Any method adopted for dispute resolution depends upon both parties having a firm, good faith commitment to resolve their differences. Absent such intention, the best structured dispute resolution procedure is likely to be unsuccessful.





APPENDIX 3

WESTERN DIVISION,  
NAVAL FACILITIES ENGINEERING COMMAND,  
PROCEDURES FOR THE  
DISPUTES REVIEW BOARD







DEPARTMENT OF THE NAVY

WESTERN DIVISION

NAVAL FACILITIES ENGINEERING COMMAND

P.O. BOX 727

SAN BRUNO, CALIFORNIA 94066-0720

WESTNAVFACENGCOMINST 4365.1G  
02C2

WESTNAVFACENGCOM INSTRUCTION 4365.1G

Subj: CONTRACTS DISPUTES ACT (CDA) CLAIMS ARISING UNDER CONTRACTS OTHER THAN  
REAL ESTATE CONTRACTS; PROCESSING OF

Ref: (a) Federal Acquisition Regulation (FAR) Subsection 14.406-4  
(b) Federal Acquisition Regulation (FAR) Section 33.205  
(c) NAVFAC P-68, Contracting Manual CHG 87-03  
(d) Navy Acquisition Procedures Supplement (NAPS) Section 33.9001  
(e) Navy Acquisition Procedures Supplement (NAPS) Subparagraph  
33.9001(c)(2)  
(f) Federal Acquisition Regulation (FAR) Paragraph 33.211(a)

Encl: (1) Standard Format for Report of Claim Receipt  
(2) Standard Format for Forwarding Claim  
(3) Disputes Resolution Board (DRB) Rules  
(4) Division of Responsibilities for DRB Actions

1. Purpose. To establish uniform procedures for processing and resolving Contractor and Government Claims arising under or related to contracts (other than real estate contracts) awarded by Western Division, Naval Facilities Engineering Command (WESTNAVFACENGCOM) and its subordinate Officers in Charge of Construction (OICCs) and Officers in Charge (OICs).

2. Cancellation. WESTNAVFACENGCOMINST 4365.1F of 31 July 1989

3. Definitions

a. Claim - The term 'claim' means a written demand by one of the contracting parties seeking, as a legal right, the payment of money in a sum certain, adjustment, or interpretation of contract terms, or other relief arising under or related to the contract. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim. However, where such submission is subsequently disputed either as to liability or amount or not acted upon in reasonable time, it may be converted to a claim. Mistakes in bid alleged after award by the Contractor will, in accordance with references (a), (b), and Paragraph 14.406(d) of reference (c), be processed as claims.

b. Administrative Contracting Officer (ACO) - The individual responsible for the interpretation and enforcement of the terms and conditions of a contract and who has the authority to direct the Contractor to perform work that he/she finds to be within the scope of the contract.

c. Procuring Contracting Officer (PCO) - The individual responsible for awarding contracts through whom the ACO must process claims packages.



d. Contracting Officer (CO) - For the purposes of this instruction, is a Level I Contracting Officer whose warrant permits issuance of final decisions. The Commander and Vice Commander; Head, Contracts Department and Special Assistant thereto; Directors of Contract Claims and Terminations Division, Design/Construction Contracts Division, Service and Environmental Contracts Division; Heads of Contract Claims and Termination Branch and Contract Claims Resolution Branch, all at WESTNAVFACENGCOM, together with the Commanding Officer and Head of Contracts Division at EFANW, currently hold warrants to issue final decisions.

#### 4. Background

a. The Contracts Disputes Act of 1978 (P.L. 95-563) (hereinafter referred to as the 'Act') provides that all contractor claims against the Government and Government claims against the Contractor relating to a contract must be submitted to the Contracting Officer for a decision (including claims for breach of contract). The Act applies to all contracts entered into on or after 1 March 1979 for:

- (1) the procurement of property, other than real property in being;
- (2) the procurement of services;
- (3) the procurement of construction, alteration, repair or maintenance of real property; or,
- (4) the disposal of personal property (other than real property).

The Act also applies, at the Contractor's election, to any claim under or relating to a contract entered into prior to 1 March 1979 if that claim was pending before the Contracting Officer on 1 March 1979 or was initiated thereafter. The Disputes clause of the General Provisions gives notice to the contracting parties that the Act applies to the contract. However, the Act applies to the foregoing listed types of contracts whether or not the Disputes clause is included in the contract.

b. Further, the Act provides that all claims by a Contractor against the Government arising under or relating to a contract shall be in writing and submitted to the Contracting Officer for a decision, and that all claims by the Government against a Contractor arising under or relating to a contract shall be the subject of a decision by the Contracting Officer except that Government counterclaims relating to fraud need not have a Contracting Officer's final decision.

c. For claims in excess of \$50,000, the Act requires: (1) that the Contractor shall certify the claim in accordance with language found in the Disputes Clause found in the contract; and (2) that the Contracting Officer within 60 days after receipt by the ACO of the Contractor's request for the Contracting Officer's decision, shall (1) issue a decision, or (2) notify the Contractor of the time within which a decision will be issued.





d. For claims under \$50,000, the Contracting Officer must issue a decision within 60 calendar days after receipt by the ACO of the Contractor's request for the Contracting Officer's decision.

e. Upon failure by the Contracting Officer to issue a decision, the Contractor may commence appeal or sue on the claim as otherwise provided in the Act, requesting the Armed Services Board of Contract Appeals (ASBCA) to direct the Contracting Officer to issue a decision in a specified period of time, as determined by the Board, or to deem the failure to act to be a decision of the Contracting Officer denying the claim.

f. Time is of the essence in identifying and processing contractor claims to assure compliance with the time restraints of the Act. When the Contracting Officer has not taken the required action within the 60 day time period and the ASBCA orders the issuance of a final decision, the Board usually sets an extremely short period for compliance with its order. In such cases the Contracting Officer does not have sufficient time to make a considered determination or to mitigate liability when partial entitlement exists. The failure to comply with the Act adversely reflects on this Command and implies to the Board probable maladministration of other requirements of the contract.

g. This Command has had failures in the past in identifying a matter as being a claim in a timely manner. Accordingly, if the ACO determines there is no entitlement any request by a Contractor for review of a matter by the OICC, 'higher authority', or by WESTNAVFACENGCOM shall be treated as a claim insofar as provision of advance notice and a claim package to Contracts Terminations and Claims Branch are concerned. Analyze the claim and the cost proposal to ascertain the exact nature of the claim and whether it varies from the issue(s) set out in the ACO's earlier determination memo.

(1) A claim by a Contractor for an interpretation of contract terms or requirements, a price adjustment, or time extension must be submitted in writing and must state the price amount applicable to the claim. Final Decisions under the Disputes clause should not be issued on issues of contract interpretation to which a monetary or time value could be but have not yet been assigned by the Contractor.

(2) Field offices should not invite contractors to request Final Decisions on such interpretation issues since this weakens their authority to properly administer the Changes clause of the contract. The Changes clause provides a procedure for the Contractor to follow if the Contractor considers a direction or interpretation from the field office to be a change.

(3) The changes clause further requires the Contractor to give written notice that it regards such direction to be a change and requires the Contractor to submit its cost and time proposal within 30 days after giving written notice. This proposal may later become the Contractor's 'claim' under the Disputes clause if the field office denies the Contractor's entitlement to the request for compensation and the Contractor considers the matter to be in dispute because it cannot accept the reason for denial.





h. A Contracts Disputes Act (CDA) claim accrues simple interest on the amount found due from the later of two dates, the date it was received by the Government or the date payment was otherwise due, until the date the amount due is paid. Some Contractors request final decisions with all of their cost proposals, regardless of whether a dispute exists, in order to collect interest. A dispute must exist in order for a CDA claim to exist. If a dispute does not exist and the matter is resolved in a timely manner, the application of CDA interest is not appropriate.

i. The Act is a highly complex law which creates different opinions by contract claims experts. Accordingly, the ACO shall not express his/her interpretations to any Contractor or give guidance to any Contractor as to his/her/its rights under the Act or as to how to handle a claim.

5. Procedures: Distribution of responsibility for action and the procedures therefor will be as described below.

a. ADMINISTRATIVE CONTRACTING OFFICERS: ACOs for WESTNAVFACENGCOM awarded contracts, in addition to complying with requirements in Section 33.218 and Paragraphs 33.219(a), (b) and (d), all of reference (c), shall comply with the following procedures.

(1) The ACO shall make the initial determination as to merit on any claim or request for equitable adjustment from a contractor. If entitlement exists, initiate and conclude negotiation in accordance with established procedures for contract modifications. The purpose of negotiations is to obtain settlement of all issues. On commingled, multi-issue claims and not readily separable, negotiations shall not be initiated if any major issue has been determined to be without merit.

(2) Whenever it appears that the ACO and the Contractor may reach an impasse on an issue, the ACO shall, at that time, prepare for a claim by accomplishing the following tasks:

(a) Review the contract documents to ascertain that his/her position is sound and prepare a determination memo to file, noting which General Provisions, Specifications (by sections and paragraphs), drawings and drawing notations support his/her position and which ones support the contractor's position. Request an audit if the amount requested warrants it.

(b) Set up a file on the subject with the determination memo and all previous correspondence on the issue. Thereafter include in the file all subsequent information pertinent to the issue, thus maintaining a complete record of the actions of each party on the issue.

(3) When the Contractor submits a request for an equitable adjustment for which the ACO does not find entitlement, the ACO shall promptly advise the Contractor of the denial of the request, in accordance with and employing the language provided in Paragraph 33.218(a) of reference (c).



(4) When the Contractor submits a written request (certified when appropriate) for a Contracting Officer's final decision (a claim), the ACO shall immediately time/date stamp the claim and notify Contract Claims and Terminations Branch in accordance with procedures described in reference (d), using the format in enclosure (1) herein and shall take the following action:

(a) If the claim is in excess of \$500,000.00 or of a nature that requires an audit the ACO shall initiate action to obtain a DCAA report in accordance with Paragraph 15.805-5(a) of reference (c).

(b) The claim shall be forwarded for action in the format and content set forth by enclosure (2) herein, being signed out by the senior person at the ACO office within 15 calendar days of its receipt if the claimed amount is less than \$50,000 and for claims in excess of \$50,000, on or prior to the date agreed to by the Director, Contract Claims and Terminations Division or his authorized representative.

(d) Upon receipt of a vague claim lacking factual information (names, dates, or circumstances to describe the basis of the claim), the ACO shall telephone or visit the Contractor and ask for the required additional information, explaining that the lack of factual information precludes provision of a final decision of the Contracting Officer. The ACO should immediately confirm the content of the discussion in a letter to the Contractor. Care must be exercised to ensure the information requested is really necessary and not already in the possession of the Government.

(4) If, after the review has been completed, the ACO determines that the claim, either in amount or entitlement, is not justified, he/she shall:

(a) Assemble copies of all correspondence, daily reports, original Government contract estimate, bid spread sheets, pre-bid inquiries, bid confirmation data, submittals, photographs, etc., that are pertinent to the claim, together with the previously prepared claim file.

(b) Prepare an independent Government estimate for each separable element of the claim.

(c) Review and extract all pertinent material, including every piece of correspondence referenced in any pertinent material, and assemble it in the format and with the content required by enclosure (2).

(d) The Contractor's request for a final decision of the Contracting Officer shall be processed in a timely manner [via the PCO on Station-awarded contracts] to WESTNAVFACENGCOM Contract Claims and Terminations Division except for claims arising under a contract type or at a location under the cognizance of another WESTNAVFACENGCOM or EFA Contracting Officer.





(e) The transmittal letter for any claim being forwarded shall be signed by the person in charge of the office administering the contract.

(5) When the ACO recommends denial or partial denial of the claim, he/she must notify the Contractor in writing that the contract adjustment requested does not appear to be warranted and that the claim has been forwarded to WESTNAVFACENGCOM for further review and final determination. In no case shall the ACO use the words "decision", "deny" or "denied" in rejecting a claim. He/she must simply state that he/she does not consider that entitlement exists, but that the claim is being forwarded for a final decision of the Contracting Officer.

b. FIELD OFFICERS IN CHARGE OF CONSTRUCTION/OFFICERS IN CHARGE: (OICCs/OICs a.k.a. PCOs) shall:

(1) Establish procedures similar to those above to carry out the policies prescribed herein for processing claims under field OICC/OIC-awarded and administered contracts.

(2) Upon receipt of a claim from an ACO under an OICC/OIC-awarded contract, review the package to verify you concur with the recommendation therein and to ensure all of the evidential documentation requisite to review and claim processing is provided. Forward the claim package with your endorsement and supplemental material to WESTNAVFACENGCOM Contract Claims and Terminations Division (or authorized EFA noted above if appropriate) within 15 calendar days of the receipt of the claim from the Contractor, and so advise the Contractor in writing.

c. WESTNAVFACENGCOM, EFANW, OICC's, OIC's, ROICC's & ROIC's: when a claim is remanded for settlement, will comply with the requirements of reference (c) Section 33.223 and Paragraphs 33.219(c) and (d).

d. WESTNAVFACENGCOM OR EFANW, when it has determined that a claim should be denied, shall issue the final decision of the Contracting Officer if it is within its authority to do so (under \$500,000) or, if over \$500,000 or unpriced, the claim will be forwarded via WESTNAVFACENGCOM Claims and Terminations Division to Naval Facilities Engineering Command (NAVFACENGCOM) Code 021 for a final decision, all in accordance with reference (c) Sections 33.220, 33.221, 33.222, and the following subparagraphs.

(1) WESTNAVFACENGCOM Contracts Department: Contract Claims and Terminations Division and the two Branches thereunder: the Contract Claims and Terminations Branch and the Contract Claims Resolution Branch, are responsible for managing claim processing. Contracts Claims and Terminations Branch will provide claims processing guidance to personnel requesting it, and upon receipt of advance notice of a claim or receipt of a claim, will log it, satisfy claim reporting requirements, and, if appropriate, issue a decision prediction letter in accordance with Paragraph 33.222(a) of reference (c), coordinating with the appropriate Contracting Officer (NAVFAC 021 or WESTDIV Contracts Department Division Director).





(a) Upon receipt of the claim package, the Contract Claims and Terminations Branch will perform the following functions:

(i) Review the claim to assure that all pertinent information and documentation is in the claim package. Claim packages not assembled in accordance with this instruction will be returned to the originating ACO without action.

(ii) Refer claims arising under EFD awarded Facilities Support Contracts and EFD awarded Environmental Contracts to the Service and Environmental Contracts Division for review and execution of final decisions.

(iii) Select claims for referral to the WESTNAVFACENGCOM Disputes Resolution Boards chaired by the Director, Contract Claims and Terminations Division and the Head, Contract Claims Resolution Branch [see Paragraph 5.d.(3) below] and support the Boards as required.

(iv) The Contract Claims and Terminations Branch will review and issue final decisions on those claims which are determined to be inappropriate for action by the Disputes Resolution Boards but otherwise fall within the categories of claims handled by the Contract Claims and Terminations Division.

(v) The Contract Claims and Terminations Branch will mail all final decisions and will maintain all claim files. This ensures continuity in processing and retrieval. Final decisions will be sent to the Contractor by CERTIFIED MAIL-RETURN RECEIPT REQUESTED and, at a minimum, a copy will be provided to the ACO, NAVFACENGCOM 021, the Litigation Office in Washington D.C., and any assignee, guarantor, or surety of the Contractor. A photo copy of the signed final decision will be placed in the final decision file maintained by the Contract Claims and Terminations Branch.

(b) When the matter at issue is not to be disposed by use of WESTNAVFACENGCOM Disputes Resolution Board the Service and Environmental Contracts Division and Contract Claims and Terminations Branch will analyze claims, creating an analysis document similar in general format to enclosure (2) herein and in conformance with the description of a technical memorandum in Subparagraph 33.220(e)(2) of reference (c). The analysis will be an unbiased presentation of the facts supporting both the Government and Contractor positions.

(c) The Contracting Officers identified in subparagraph 5.d.(1)(b) above will refer the claim package and analysis thereof to the Office of Counsel for provision of a legal memorandum prepared in accordance with reference (e) and Subparagraph 33.220(e)(1) of reference (c). The analysis document and legal memorandum will display the following legend on each page:

'ATTORNEY-CLIENT PRIVILEGE FOR OFFICIAL USE ONLY: This document is prepared for use by Government attorneys in connection with a contractor's claim. It is not to be released outside the Government or to Government personnel not having a need-to-know.'



(d) Upon provision of the legal memorandum by Counsel, the Contracting Officer will execute the final decision, forward the claim (in the event it exceeds \$500,000) to COMNAVFACENGCOM 021 for a final decision of the Contracting Officer, or return the claim to the ACO for settlement by negotiation. Construction contract claims will be returned via WESTNAVFACENGCOM Construction Division which will ensure that the Contractor is timely notified of the intent to settle and ensure settlement is effected.

(e) While the Contracting Officer may rely on technical and legal advice, the final decision must represent the independent conclusion of that Contracting Officer and must conform in content to reference (f) and Paragraph 33.220(g) of reference (c).

(2) Legal Counsel: Counsel will provide the Contracting Officer with a legal memorandum on the merits and weaknesses of both the Contractor and Government positions promptly following receipt of the claim package. The memorandum, as noted above, will follow the guidelines set forth in reference (e) and Subparagraph 33.220(e)(1) of reference (c) and may include a discussion of relevant ASBCA or Claims Court cases.

(3) Disputes Resolution Board: The Disputes Resolution Board is a variation of the EFD CONTRACT REVIEW BOARD described in Section 33.221 of reference (c) and is chaired by a Level I Code 02 Contracting Officer who is supported by representatives from the Construction Division and the Office of Counsel. The Board is intended to hear informal presentations from both ACO and Contractor personnel to provide expeditious final decisions on claims and, in practice, travels to the vicinity of the source of the claims when it will facilitate hearing oral argument. Enclosure (3) is a copy of the rules of the Board as they relate to the conduct of hearings and enclosure (4) identifies the action party(ies) for each task in a Disputes Resolution Board action..

(4) Engineering Field Activity (EFA): The EFA authorized to issue final decisions of the Contracting Officer will establish and, upon receipt of a claim package on a contract from within its assigned area of authority, follow procedures similar to those outlined in subparagraphs 5.d.(1) through 5.d.(3) above.

e. SUPPORT OF TRIAL COUNSEL: As provided in Section 33.224 of reference (c), all WESTNAVFACENGCOM personnel at all echelons will fully support trial counsel and will refrain from discussing matters that are the subject of litigation with non-Government personnel or Government personnel not having a need to know.

f. SETTLEMENT OF CLAIMS ON APPEAL: Rules for settlement are provided in Section 33.225 of reference (c).





Distribution:  
List D and E

Copy to:

09A

09B

09P

02 (10)

04 (10)

05 (5)

16 (10)

18 (5)

20 (5)

24 (2)

Stocked: Code 02C1 (100)





STANDARD FORMAT FOR REPORT OF CONTRACTS DISPUTES  
ACT (CDA) CLAIMS RECEIPT

From: [Administrative Contracting Officer (ACO)]  
To: (Western Division, Naval Facilities Engineering Command Code 02C1)  
(Engineering Field Activity Northwest Area)  
Subj: CONTRACT NO. N62474-\_\_\_-C-\_\_\_\_\_, ENTITLED:\_\_\_\_\_

Encl: (1) (Contractor Claim Letter)

1. This will serve to notify you of the receipt of a Contracts Disputes Act Claim arising under or related to the subject contract and the following information is provided:

- a. Contractor's name: \_\_\_\_\_
- b. Contractor's address: \_\_\_\_\_  
\_\_\_\_\_
- c. Contract Award Amount: \_\_\_\_\_
- d. Current Contract Price: \_\_\_\_\_
- e. Date and Place Claim Was Received: \_\_\_\_\_
- f. Date and Place Certification was received: \_\_\_\_\_
- g. Claimed Amount (money & time): \_\_\_\_\_
- h. Basis of the Claim: \_\_\_\_\_  
\_\_\_\_\_
- i. Assessment of Claim Validity: \_\_\_\_\_  
\_\_\_\_\_
- j. Planned Claim Disposition: \_\_\_\_\_
- k. ACO Point of Contact: \_\_\_\_\_  
Telephone # \_\_\_\_\_
- l. Audit Requested: \_\_\_(Yes) or (No)\_\_\_  
Date Audit Due: \_\_\_\_\_ (if applicable)

Enclosure (1)



WESTDIV STANDARD FORMAT FOR FORWARDING CLAIM

From: (Administrative Contracting Officer)  
 To: Commander, Western Division, Naval Facilities Engineering Command, (Code 02C1)

Via: OIC/OICC (location). (If Station awarded contract.)

Subj: CONTRACT N62474-\_\_-C-\_\_ FOR \_\_\_\_\_; CLAIM

Ref: (a) WESTNAVFACENGCOMINST 4365.1G

Encl: (1) Conformed copies of the contract, a complete ) IN  
       set of contract drawings and all Modifications. ) DUPLICATE  
       (2) Contractor claim letter w/encls. )  
       (3) Government cost estimate of each claim issue ) IN  
           (There will be no \$0 estimates ) ) TRIPLICATE  
       (4) All letters referenced in any enclosure )  
       (5) through ( ) [Each individually identified )  
           evidential document w/encls] )

1. In accordance with reference (a), enclosures (1) through ( ) are forwarded for a final decision of the Contracting Officer on a claim relating to (characterize subject of dispute).

2. The following matters are pertinent to the claim:

a. Contract Data: The subject contract was awarded on (date) to (Contractor's name from contract) whose current address is (address from the contract or latest address established in a modification to the contract) in the amount \$ \_\_\_\_\_ with a completion date of (from the contract).

Modifications P-00001 through P- \_\_\_\_\_ increased the contract in the amount \$ \_\_\_\_\_ and extended the contract completion date to (from contract modification).

The contract work is \_\_\_\_\_ percent complete as of (date) (or UCD was date).

As of (date) (No.) progress payments have been made in the amount \$ \_\_\_\_\_. Retentions in the amount \$ \_\_\_\_\_ have been withheld for (detail).

b. Claim Amount: \$ \_\_\_\_\_ and \_\_\_\_\_ calendar days.

c. Controversy: The contractor contends (for each claim item). The Contract Administrator contends \_\_\_\_\_ (for each claim item).

Enclosure (2)





(for Subparagraphs d, e, f, cite all pertinent information bearing on the claim.)

d. General Provisions: Clause \_\_\_\_\_ provides: (brief statement).  
(List each pertinent clause.)

e. Specifications: Section \_\_\_\_\_ provides: (brief statement containing excerpts from pertinent Specification paragraphs).

f. Drawings: NAVFAC Dwg. No. \_\_\_\_\_ shows: (brief description of what is shown on drawings including pertinent detail(s).)

g. Bid and Pre-Bid Information: (If applicable, provide all contract file documents relating to pre-bid inquiries and site investigations, the original Government contract estimate, and schedule of bids. If no pre-bid records are found, make a negative report.)

h. Other Material Information: (Address and forward all pertinent evidential material and information whether or not it supports the Government position).

i. Validity of Claimed Amount: The Contractor's cost proposal, enclosure ( ) to enclosure ( ), is in the amount \$\_\_\_\_\_.

In the event entitlement is found, the Government estimate, enclosure ( ), is in the amount \$\_\_\_\_\_ with a time extension of \_\_\_\_\_ calendar days.

The DCAA audit report, enclosure ( ), questions \$\_\_\_\_\_. (If an audit report is not enclosed state whether or not one has been requested and indicate the estimated date of completion.)

j. Potential Witnesses: In the event further information is required, the person(s) possessing knowledge relative to the claim is (are): (Name the person(s) having first-hand, detail knowledge of the facts pertaining to the claim.)

NAME: \_\_\_\_\_  
TITLE: \_\_\_\_\_  
ADDRESS: \_\_\_\_\_  
PHONE NO.: \_\_\_\_\_

3. (This and subsequent paragraphs are for evaluation as to the merits, in accordance with the contract terms, of each item of the claim; and for setting forth the basis for the ACO's position on each item of the claim. Identify here each action of the Contract Administrator which in retrospect is determined not to have been proper under the circumstances.)

4. (ACO's recommendation as to each claim item.)

End of this form





## DISPUTES RESOLUTION BOARD (DRB) RULES

General: The DRB (the "Board") provides Contractors with the opportunity to present their claims to senior procurement personnel who have not been involved as an immediate party to the dispute. The Board is composed of a Contracts member (Contracting Officer), a Construction (engineer) member and a member from the Office of Counsel. The Board basically follows these simple rules:

- (1) The Contractor will be given the opportunity to present his/her argument relating to both entitlement and quantum in any form desired, however the presentation can last no longer than a pre-established time. [This time limit will be set in advance by the Board in accordance with the magnitude and complexity of the claim(s). Normally, this will be from 30 to 60 minutes.] The ROICC will be given an equal opportunity to present its argument. Each side will then be offered 10-20 minutes for rebuttal. During the presentations and rebuttals, each side is given the opportunity to proceed without interruption from the other side, however the Board may ask questions during the presentations or rebuttals to solicit clarification.
- (2) The Board may, in certain instances, invite each side to ask questions of one another.
- (3) No attorneys will be allowed from either side. No transcript or tape recording of the proceedings will be allowed. No formal rules of evidence will be followed. The atmosphere will be informal. There will be no special rules of presentation. Evidentiary exhibits, documents, photographs, etc., are encouraged but are not mandatory. The Board will have already read the Contractor(s) claims and will have copies of the claim(s) in its possession at the session. There is no need to duplicate documents already submitted with the claim, however each side is required to bind and tab six (6) copies (three for the Board and three for the other side) of any new documents they wish to be discussed.
- (4) Subcontractor claims are not considered except as may be presented by the prime contractor. Subcontractor personnel may be present, however no more than three (3) individuals (contractor and subcontractor personnel combined) shall be in attendance concerning any single issue. This "Rule of Three" applies to the ROICC representation as well.
- (5) Contractor representatives must have authority to settle on the spot.
- (6) The Board will attempt to settle the matter or issue a final decision within its authority within two weeks of the proceeding.
- (7) The Board possesses the authority to hear all issues regardless of amount and render final decisions on claims less than \$500,000.00.
- (8) These seven rules listed above may be adjusted by the Board on a case by case basis to better serve the interests of both parties in the event good and sufficient reason exists for the change.

Enclosure (3)



## DIVISION OF RESPONSIBILITY FOR DISPUTES RESOLUTION BOARD ACTIONS

STAGE	TASK	CODE*
-----		
PREPARATORY		
	Marketing.....	09C
	Scheduling w/ROICC .....	09C
	Confirming w/ROICC.....	09C
	Scheduling w/contractor.....	09C
	Ltr. to contractor (initial & confirming).....	09C
	Copying claims (3 copies).....	02C1
	Reviewing claims.....	DRB
	Travel arrangements.....	05C
	Space arrangements.....	05C
	Status of Project Funds.....	05C
	Audit check.....	05C
DURING HEARING		
	Intro & Explanation of the rules.....	02C
	Maintaining control.....	02C
	Note taking (general).....	DRB
	Note taking (technical).....	05C
	Note taking (legal concerns).....	09C
	Questions during presentation.....	DRB
	Calling breaks.....	02C
	Ending session.....	02C
POST HEARING		
	Deliberation.....	DRB
	No entitlement/partial entitlement	
	a. Prepare legal sufficiency memo.....	09C
	b. Statement of factual areas of agreement and disagreement (findings of fact).....	TBD
	c. Rationale for decision and decision.....	02C
	d. Obtain decision # from 02C1.....	02C
	e. Execute decision.....	02C
	f. Distribute Decision.....	02C1
	Entitlement-Quantum at issue	
	a. Remand to ROICC for negotiation.....	DRB
	1. Prepare DRB memo to ROICC w/ cy to 02C1....	05C
	2. Provide signed cy of mod to 02C1.....	ACO
	b. Settlement offer by Board.....	DRB
	1. Prepare Government estimate.....	05C
	2. Board Rpt./Bus. Clearance prep.....	DRB
	3. Approve Bus. Clearance.....	02
	4. Obtain funds for mod.....	05C
	5. Prepare & issue mod.....	ACO
	6. Provide signed cy of mod to 02C1.....	ACO
	Entitlement - Quantum no issue	
	a. DRB memo to ACO directing issue of mod.....	05C
	b. Provide signed cy of mod to 02C1.....	ACO

\*For Facilities Support Contracts, A-E contracts supporting Facilities Management, or Utility Service Contracts the 05C representative may be replaced by a technical expert from Code 16 or Code 08.



APPENDIX 4

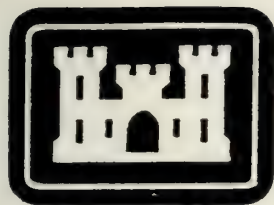
U.S. ARMY CORPS OF ENGINEERS

PAMPHLET ON

THE MINI-TRIAL







**US Army Corps  
of Engineers**

**Pamphlet 1**

**ALTERNATIVE DISPUTE  
RESOLUTION SERIES**



# **THE MINI-TRIAL**

**April 1989**

**IWR Pamphlet-89-ADR-P-1**



## ***The Corps Commitment to Alternative Dispute Resolution (ADR):***

*This pamphlet is one in a series of pamphlets describing techniques for Alternative Dispute Resolution (ADR). The series is part of a Corps program to encourage its managers to develop and utilize new ways of resolving disputes. ADR techniques may be used to prevent disputes, resolve them at earlier stages, or settle them prior to formal litigation. ADR is a new field, and additional techniques are being developed all the time. These pamphlets are a means of providing Corps managers with up-to-date information on the latest techniques. The information in this pamphlet is designed to provide a starting point for innovation by Corps managers in the use of ADR techniques.*

*These pamphlets are produced under the proponentcy of the U.S. Army Corps of Engineers, Office of Chief Counsel, Lester Edelman, Chief Counsel; and the guidance of the U.S. Army Corps of Engineers Institute for Water Resources, Fort Belvoir, VA, Dr. Jerome Delli Priscoli, Program Manager. James L. Creighton, Creighton & Creighton, Inc. served as Principal Investigator.*

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# **THE MINI-TRIAL**

Alternative Dispute Resolution Series

Pamphlet 1

Written By:

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**Frank Carr**  
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U. S. Army Corps of Engineers

**James L. Creighton**  
Creighton & Creighton, Inc.

April 1989

IWR Pamphlet-89-ADR-P-1





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# The Mini-Trial

This pamphlet describes "the mini-trial," one of a number of alternative dispute resolution techniques which the US Army Corps of Engineers is using in an effort to reduce the number of disputes requiring litigation. The pamphlet describes what the technique is, how it has been used, and then provides guidance on how to go about conducting the mini-trial process.

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## What is a Mini-Trial?

First of all, a mini-trial isn't a trial. There's no judge nor lengthy procedures. Decisions are reached quickly and made by managers who have managerial and, often, technical skills, not by third parties such as judges. In fact, the mini-trial is a structured form of negotiated settlement. All parties enter into a mini-trial voluntarily, and any party can drop out when it wants to. A mini-trial is successful when there is a mutual agreement.

Here's what a mini-trial might look like:

- Two or more organizations involved in a dispute would agree to use a mini-trial as an alternative to going to court, a contract appeals board, or some other judicial body.
- Each participating organization would designate a senior manager to represent the organization and to make binding commitments on behalf of the organization. Ideally this manager would not have had any substantial previous involvement in the dispute.
- The management representatives and their attorneys would then jointly develop a mini-trial agreement. Since the mini-trial is to help them make decisions, they need to define what they want to happen before and during the mini-trial. This agreement serves as a guide for the entire process, specifying roles, time limits, schedule and the procedures which will be used during the mini-trial itself. The mini-trial agreement also specifies dates when "discovery" - the legal process of collecting evidence - will be concluded, and agreements regarding limits which will be placed on discovery or commitments of the parties to exchange information. While the mini-trial agreement establishes a clear structure, it is also highly flexible, because the management representatives can agree upon whatever procedures will work for them.
- Attorneys for the participating organizations would then go about preparing their case, advocating the position of their organizations. One unique thing about these preparations, though, is that the attorneys know that they will have only a few hours, or at most several days, to present their case. This means they must focus on their best arguments and strongest supporting evidence, presenting those things which will be most persuasive to the management representatives. The amount of time attorneys will have to present the case of their organizations will be specified in the mini-trial agreement.





- Normally the mini-trial agreement will specify that both parties will prepare short position papers outlining their case. These papers will be exchanged at an agreed-upon time before the mini-trial so that management representatives will be able to read them prior to the mini-trial itself.
- At the agreed-upon date, attorneys for the participating organizations will present their cases in front of the management representatives of the organizations. This presentation is referred to in this pamphlet as "the conference." As suggested earlier, these presentations will usually be limited to just a few hours. There may also be a question and answer period following each presentation.
- In many mini-trials, the management representatives are assisted by an impartial neutral advisor. This is optional. If used, the neutral advisor can play different roles, depending on the preferences of the management representatives. The neutral advisor might actually preside over the presentation portion of the mini-trial. Or the neutral advisor might simply advise on points of law or technical matters. Many mini-trial neutral advisors have been retired judges or law professors, who could discuss those arguments they found most impressive, given the law. On other occasions, the neutral advisor has been a technical expert on the subject matter of the dispute, able to advise on standard engineering practice or other technical issues. Any opinions provided by the neutral advisor are just that, advisory. The decisions are made by the management representatives, after the formal mini-trial presentations are over.
- Following the presentations and any questions, the management representatives would then move to another room, without their staffs, and attempt to re-

solve the dispute. No one is bound to come up with an agreement. But almost always, agreements are reached which effectively resolve the dispute.

- The results of the mini-trial are then documented as carefully as any other negotiated settlement which could be subjected to review by whoever has an interest in whether the negotiated settlement is fair.
- The mini-trial agreement will also include a provision that statements made by participants during the mini-trial can't be used against participants in court if no agreement is reached during the mini-trial. This means that concessions made in the relatively informal mini-trial conference can't be dragged up later on in court.

As you can see, mini-trials are:

#### ■ Voluntary

Nobody is pressured into using a mini-trial. Any organization agreeing to participate in a mini-trial does so because it believes it is advantageous to do so. Any participant can drop out at any time, even during or after the conference.

#### ■ Expedited

Participants commit themselves to an expedited schedule. Issues can't drag on forever. Since time for presentation of their cases will be strictly limited, attorneys must focus on only their best arguments.

#### ■ Non-Judicial

Decisions are made by negotiation between the management representatives. No judges make the decisions for the parties.





### ■ Informal

The conference doesn't have to comply with strict rules for how it should be conducted. Participants can decide what procedures they want to use, what roles people will play, and what issues will or will not be discussed. There is a structure, but it is flexible because the mini-trial can be conducted any way the management representatives feel will get them the information they need to make a good decision.

### ■ Confidential

Since no one knows for sure in advance whether a mini-trial will result in a settlement, everybody wants to protect their ability to go to court if an agreement can't be reached, and not have statements made during a mini-trial conference used against them. Confidentiality alleviates this concern and encourages the parties to make frank comments and concessions during the mini-trial conference.

## Why Use a Mini-Trial?

What are the advantages of a mini-trial over more traditional ways of resolving disputes, such as litigation or formal administrative procedures? There are a number of advantages:

### ■ Puts the Decision Back in the Hands of Managers

Typically, disputes are handled by middle level managers. By the time senior managers get involved in a dispute, sides are already polarized. The senior manager is likely to hear only his organization's position. Mini-trials put facts before senior managers. They get to hear all sides of the issue, not just their own, and can take into account the relative strength of their organization's case, the risks involved in proceeding to court, the added costs of a court case, etc. Typically, middle level managers do not

have the authority to make these kinds of trade-offs. Senior managers retain the decisionmaking authority, and their decisions can be based upon a complete review of the facts.

### ■ Greater Flexibility in Possible Settlements

Normally managers enjoy greater flexibility in the options they can consider than do judges. Judicial decisions usually require deciding one side is right and the other wrong, resolving the dispute but potentially destroying the business relationship between the parties. Sometimes judges are forced to make decisions based on relatively narrow points of law, such as whether the proper procedures have been followed, rather than the equity of a decision. Neither judges or attorneys can ever know as much as line managers about how the interests of the participants converge, and what creative solutions are possible in which both parties could win. This is not to suggest that managers don't work within limits. In contract claims, for example, Corps managers remain bound by government procurement regulations. The mini-trial provides a structure which respects what the law requires, but gives managers maximum flexibility within these laws.

### ■ Protect the Relationship

Many of the parties involved in disputes with the Corps of Engineers are people with whom the Corps has worked effectively in the past, and would like to work with again in the future. Parties to a dispute might include contractors, suppliers, local governments, even other federal agencies, whose expertise and goodwill the Corps needs to retain. They equally have an interest in maintaining their relationship with the Corps. When disputes are decided by the courts, there is often a breach in the relationship between the parties. Whoever loses is unlikely to want to work with the other party again in the future. But when issues are resolved by negotiated agree-





ments, with both parties thinking they got a fair deal, they also feel good about each other and can rebuild the relationship needed to work together effectively.

### ■ Time-Savings

It is now normal for major disputes to take 1-2 years to get to trial and 3-5 years to get a decision from a judge or judicial panel such as a contract appeals board. In part, this is because court dockets are already crammed. In part it is due to time spent in "discovery" - the formal process of gathering evidence and taking depositions - which precedes a trial. Mini-trials can expedite the discovery process, saving weeks or months. And the mini-trial conference is typically weeks, even months, shorter than a court trial.

In total, years may be saved in reaching a final settlement of the dispute. More important, the participants can decide when they want the mini-trial. If they decided almost immediately to use a mini-trial, the issue might be resolved in just a few months, instead of years.

### ■ Cost Savings

In some cases, time alone costs money. For example, if a settlement would involve payment of interest, the interest costs building up over several more years can add significantly to the cost of the settlement. But mini-trials also save in other ways. One major area of saving is the reduced costs of discovery, (the gathering of legal evidence such as taking depositions or making interrogatories). Since attorneys will have only a short time to present their case, they must focus on the key issues supporting their positions. This not only saves time during the conference itself, but also sharply reduces the amount of evidence which must be gathered before the conference. Also, since time is short, attorneys carefully select and limit the number of witnesses. The other major cost savings is the relatively modest cost of the mini-trial conference versus the cost of a full-blown court case. The costs for attorneys, witnesses, and experts to appear

in court, sometimes for several weeks or more, can be very high. A one or two day conference is simply going to cost much less than a court case which goes on for weeks or months.

### ■ Protect Management Time

Full-scale litigation doesn't just involve attorneys. Typically it also involves substantial key manager and consultant time to prepare the case, brief the attorneys, and serve as witnesses. Often both managers and staff must be pulled away from other priority projects to devote full attention to the court case. While the case goes on, they can't do the work they need to carry out the rest of their job. There's no question that a mini-trial does make demands on their time, but significantly less.

## Concerns Expressed About Mini-Trials

Every dispute resolution technique has its strengths and weaknesses, and mini-trials are no exception. Some concerns expressed about mini-trials are not, however, well-founded. Here's a list which includes both very real limitations of mini-trials, and concerns expressed by people who have not used the technique:

### ■ Not Appropriate for Some Issues

Mini-trials are not appropriate for some issues, but they are appropriate for many of the disputes with which the Corps deals, which are factual disputes. The Corps of Engineers confines the use of mini-trials to cases where the law is well established, where settlement turns on the facts of the case. A great value of the mini-trial is that it returns to managers the authority to make decisions based on an appraisal of all the risks and impacts to the organization. But some decisions are more appropriate to be made by a judge. Interpretation of a new





law or regulation, for example, would not be an appropriate issue to resolve by using a mini-trial.

### ■ Extra Work for Managers

A mini-trial does take a concentrated commitment of time from a senior manager and attorney. Time will be spent reviewing the mini-trial agreement, getting briefed prior to the mini-trial, participating in the mini-trial conference, and then participating in the negotiations which follow. If the dispute were to go to court, however, the trial will take much more staff time, and it is probable that the time required of the senior manager is also greater. Although broken up into smaller pieces - and therefore easy to forget about - the time a senior manager spends on a court case is often very substantial. However, the time spent in the mini-trial is highly intensive, requiring more time for a short period. One advantage of a mini-trial is that managers have some choice about when they schedule it. With a court case, you typically go to trial whenever the judge is able to schedule the case.

### ■ Cost of Preparation

Some attorneys, particularly attorneys who have not participated in a mini-trial, worry about the costs of preparing for a mini-trial, since they may have to go to court afterwards anyway. Attorneys who have participated in mini-trials say that virtually all the preparation they did for the mini-trial they would have done for the court case anyway, so most of the cost incurred for the mini-trial reduces the cost of the court case. In addition, even when mini-trials don't result in full agreement they often clarify the key issues, or remove some issues. This means that the remaining discovery can be more focused and efficient. Attorneys who've used mini-trials also point out that the mini-trial gives them a chance to test their case, to discover which arguments are persuasive and which are not. This can actually strengthen their ability to present their case in court if they need to.

### ■ Is It the Best Possible Deal

Just because a mini-trial decision is made quicker or cheaper than a trial court decision doesn't automatically make it better, so it is easy to play a "what if" game to argue that the organization would have done better in front of a judge. Managers may even be vulnerable to criticism within their own organization that they "gave away the store." This could happen because only the senior manager has heard the other participants' cases, while people within the organization tend to have heard only one side of the story.

### ■ Protection Against Lying

Because mini-trials are an informal process, without a judge, there is no oath administered and most mini-trials do not include cross-examination. Some people fear that this does not provide protection against fraudulent statements or mistruths. While there can be some risk, just as there is with a court case, attorneys who've used mini-trials feel they usually have sufficient information about the case to protect their client from clearly misleading information. One attorney who has used mini-trials commented: "Everybody wants to use cross-examination, until they've actually seen a mini-trial. Then they realize it is unnecessary."

### ■ To Offer to Use a Mini-Trial Says We Have a Weak Case

Some managers fear that by offering to use any ADR technique, including a mini-trial, you are communicating that your case is weak. As a result, the other side may dig in even more, thinking it can win or negotiate a more favorable settlement. This attitude is becoming less prevalent, and some managers have taken steps to remove this barrier by issuing a policy to offer to use ADR techniques on all disputes before going to court. By making it a policy, they remove any suggestion that offering to use ADR suggests weakness on any particular case.





### ■ It's Not Supporting the Field

The Corps has a long tradition of supporting decisions made in the field. To some, having a senior Corps manager make a decision which alters an earlier decision made in the field violates this tradition. It's one thing if a judge overrules them, but still another if someone from their own organization decides the other guys might have had a point. However, judges do not consider the impact of their decisions on the organization, while senior Corps managers understand how decisions can affect field operations and programs.

To sum up this introduction to the mini-trial, it's important to remember that despite its name, the mini-trial technique is designed to assist managers in making settlement decisions rather than turning decisions over to judges. The settlement negotiations are helped along by the structured, fact-based format of the mini-trial conference. And because the mini-trial is voluntary, it fosters a cooperative spirit among the representatives which can promote settlement of disputes which would otherwise be destined for litigation.



# Mini-Trials In Practice

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## Corps' Experience with Mini-Trials

In its first mini-trial, the Corps of Engineers successfully resolved a contract claim that was pending before the Armed Services Board of Contract Appeals (ASBCA). The mini-trial involved an acceleration claim in the amount of \$630,570 by Industrial Contractors, Inc. The principals resolved the claim in less than three days, and the dispute was settled for \$380,000. At the mini-trial, the government was represented by the Corps' South Atlantic Division Engineer, while the contractor was represented by its president. The neutral advisor was a retired senior claims court judge from the U.S. Claims Court.

The Corps' second mini-trial involved a dispute arising out of the construction of the Tennessee Tombigbee Waterway. The \$55.6 million claim (including interest) involved differing site conditions, and was filed at the Corps of Engineers Board of Contract Appeals by Tenn-Tom Constructors, Inc., a joint venture composed of Morrison-Knudsen, Brown & Root, and Martin K. Eby, Inc. A vice-president for Morrison-Knudsen acted as principal for the joint venture, and the Ohio River Division Engineer represented the government. A law professor, who is an expert on Federal contract law, was the neutral advisor. One interesting aspect of this case is that following three-day mini-trial conference the senior managers met, but decided that they could not resolve the issue without additional information and scheduled a follow-up one day mini-trial conference two weeks later.

Following this second conference, the principals agreed to settle the claim for \$17.2 million, including interest.

After this mini-trial was concluded, the settlement was investigated by the Department of Defense Inspector General. The investigation was initiated because of a "hotline" inquiry about the appropriateness of the settlement. After conducting an extensive review, the Inspector General made a formal report. The Inspector General found that the settlement was in the best interest of the government and concluded that the mini-trial, in certain cases, is an efficient and cost-effective means for settling contract disputes. This conclusion provides a strong validation of the mini-trial as an ADR method for resolving government contract disputes.

The Corps has also recently successfully concluded a mini-trial over financial responsibility for clean-up of a Superfund site, with the Corps acting on behalf of the Department of Defense. In this case, the mini-trial led to a successful resolution of cost-sharing, when other forms of negotiation had been unsuccessful.

Other Corps' uses of mini-trials included:

- Resolution of \$105 million of claims arising out of the construction of the King Khalid Military City, Saudi Arabia. This involved some sixty claims which were ultimately settled for \$7 million.
- Resolution of claims for \$765,000 from construction of a visitor's center at a recreation area. A settlement was reached for \$288,000.





- Nine appeals arising from a contract for the repair and modification of tainter gates at Greenup Lock and Dam, on the Ohio River, were settled after a two and one-half day mini-trial. The total amount claimed was \$515,000, which was settled for \$155,000.
- Seven disputes regarding the construction of the Consolidated Space Operations Center in Colorado were resolved using a mini-trial. The claims, totaling \$21.2 million were from the prime contractor and a subcontractor. These claims were settled for \$3.7 million.

## Experience of Other Government Agencies

Following the Corps' lead, both the Department of the Navy and the Department of Energy have begun to use mini-trials. The Navy has participated in several mini-trials. Two of the mini-trials resulted in negotiated agreements. A third mini-trial succeeded in narrowing the disputed issues, but did not result in a negotiated settlement. Recently, the Navy drafted two additional mini-trial agreements to resolve pending disputes, only to have the parties settle the dispute prior to the actual mini-trial. Apparently whatever psychological/legal barriers were surmounted in deciding to participate in the mini-trial led to an immediate settlement.

## Corporate Experience with Mini-Trials

A number of companies have used mini-trials, including Allied Corporation, American Can Company, American Cyanamid, AT&T, Borden, Control Data, Shell Oil, Standard Oil of Indiana, Texaco, TRW, Un-

ion Carbide and Xerox. Mini-trials have been used in cases involving breach of contract, antitrust, construction, unfair competition, unjust discharge, proprietary rights, and product liability claims. They've also been used in complex multi-party cases, and international commercial disputes.

Nearly 500 companies or major law firms are members of the Center for Public Resources, Inc. (CPR), a non-profit organization which advocates the use of ADR techniques in the corporate world. A recent study of 114 companies by CPR looked at which ADR techniques were being most frequently used by companies. The mini-trial (39% of the cases) was by far the most frequently used technique, used more than twice as often as mediation (17%) and private arbitration (12%), the other techniques in the top three on the list.





# Planning for a Mini-Trial

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How do you actually go about initiating and conducting a mini-trial? This section provides guidance on the specifics of preparing for and conducting a mini-trial.

The basic steps in conducting a mini-trial are:

- 1) Determine whether a mini-trial is appropriate for a particular dispute.
- 2) Obtain any needed Corps management commitments.
- 3) Approach the other parties to get their agreement to participate.
- 4) Select management representatives for each organization.
- 5) Select a neutral advisor.
- 6) Develop a mini-trial agreement.
- 7) Complete "discovery," as defined in the mini-trial agreement.
- 8) Exchange position papers.
- 9) Hold a preliminary meeting between the neutral advisor and the management representatives.
- 10) Conduct the mini-trial conference.
- 11) Conduct negotiations following the conference.
- 12) Document any agreements reached.

Further information on each of these steps is provided below:

## When is a Mini-Trial Appropriate

The first criteria for a mini-trial, of course, is that both (or all) sides agree to use a mini-trial. But before suggesting the use of a mini-trial to other parties to a dispute, there will always first be an internal process of consultation and analysis to determine whether a mini-trial is appropriate for a particular dispute. This is normally done before any discussion with the other party, so that they don't feel an offer was made, then withdrawn.

The Corps believes that managers should make decisions about how to resolve disputes, so there is no "dispute resolution staff" held responsible for identifying disputes where a mini-trial is appropriate. The idea that a mini-trial might be effective could start with a district counsel; a district engineer; a reviewer at Division or OCE; or a manager in engineering, construction and operations, contracts, regulatory - wherever disputes occur. Of course, a contractor could also suggest a mini-trial. Typically the first step is to discuss the idea with others at a local level, so that you know enough about the dispute to make an analysis as to whether a mini-trial fits this particular situation.

The first level of analysis is very practical: Does this dispute justify the time and expense of a mini-trial? Although mini-trials are much less expensive than a full court case, or a case before the Board of Contract



Appeals, there are still costs. If the dispute is quite small, the costs of the mini-trial might exceed the benefits to the government. In the contracts area, there are expedited procedures at the boards of contract appeals for disputes under a certain small dollar amount.

Once you've decided that the size and importance of the dispute would justify consideration of a mini-trial, you need to look at whether this is a dispute about what the law means, or whether it is a dispute about the facts of a case - what happened to whom. It is Corps policy not to use mini-trials to resolve issues that do not have clear legal precedent already established. However, since the vast majority of cases involve factual rather than legal disputes, only a small number of cases will be affected. If in doubt, District or Division Counsel will be able to provide guidance to Corps managers on which issues may involve purely legal disputes.

The other circumstance where mini-trials are not appropriate is in disputes where the only alternative is to declare one side or the other completely right, the sort of thing a judge does in issuing a summary judgment.

Because mini-trials are essentially a negotiation process, it is unreasonable to think that you can negotiate an agreement in which either side completely capitulates.

## Who Decides to Propose a Mini-Trial

After discussions at a local level, it is necessary to obtain approval from the appropriate Corps manager before proposing the use of a mini-trial to the other party. In the case of a dispute over a contract, for example, this could be the Contracting Officer, or the Division Engineer. For a dispute over a Defense Environmental Restoration Program Super-

fund site, officials in the Department of Defense also may need to be consulted. The point is that for the mini-trial to work, representatives must be able to commit their organizations to any agreements reached. There is no point in proposing a mini-trial to another party unless the manager in the Corps who can make such commitments agrees to the mini-trial. This does not automatically mean that the person who has this authority when a mini-trial is proposed has to be the Corps management representative. The binding authority to resolve a dispute might be delegated or transferred to another qualified senior manager.

## Proposing a Mini-Trial to the Other Party

There are two questions to ask in determining how to propose the use of a mini-trial to another party. When in the course of a dispute is it appropriate to propose a mini-trial? Who should make the contact with the other party?

One answer to the question of when to propose a mini-trial is: whenever you think the other parties will be receptive. But the Corps' experience with mini-trials suggests that mini-trials are more effective after the basic facts have been gathered, and the issues defined. On the other hand, if a major purpose of mini-trials is to save time and legal expense, there is less benefit from a mini-trial in waiting until a significant percentage of the legal cost has already been incurred. The most effective time for proposing a mini-trial seems to be just before the contracting officer reaches a final decision or, if already in court, early in the process of "discovery," but before there are significant litigation costs.

Most often, the suggestion to use a mini-trial comes from attorneys representing the





parties. But in some cases, a senior Corps' manager, such as a district engineer or division engineer, may want to contact a senior executive for the other party to suggest a mini-trial. There is always a certain appeal in having a senior executive from one organization suggest to a senior executive of another that: "We're practical people used to making hard decisions, and we should be able to resolve this thing."

One of the main problems in getting a commitment from another party - especially if the other party is not familiar with mini-trials - is providing enough information about mini-trials to the other party so that they are comfortable that it is a fair and equitable forum. If they are not familiar with mini-trials, they may fear it gives the Corps some advantage, or they may feel uncomfortable simply because they have not done it before. One way to start might be to give them this pamphlet. Or you might provide them with some of the other resource materials described in the bibliography. When disputes are going to be resolved in a contest where there will be a winner and a loser, there may be some advantage if your opponent knows less about the process than you do. But in any dispute resolution process where the emphasis is on achieving a mutual agreement - such as in a mini-trial - then the process is more likely to be a success if both sides become skilled in the use of the process. For the process to work, the other party needs to be comfortable with the mini-trial process, and understand as much as possible about how it works. Also, by being forthcoming with any assistance you can, you're helping to build the atmosphere which could contribute to an agreement.

## Selecting the Management Representatives

The senior management people who will represent each organization are normally selected before the mini-trial agreement is developed. This is done so that they can participate in developing the agreement. While the mini-trial is a structured negotiation process, there is considerable latitude in how the mini-trial is conducted. The management representatives need to ensure that the procedures described in the agreement will serve their needs.

There are two basic criteria for selection of the senior managers to represent the organizations:

### ■ Not Previously Associated with the Issue

One of the advantages in the participation of senior managers who have not been previously involved in the dispute is that they come to the issue fresh. They aren't already locked into rigid ways of viewing the issue. This advantage is lost, of course, if the senior manager representing the organization is someone who was intimately involved in the issue, particularly if this means he or she will need to defend previous decisions. You want people who can consider the issues without feeling defensive.

While this logic holds true as a general principle, some smaller companies - particularly something like a family-owned company - may have no senior managers who haven't been involved to some extent. Even within the Corps, it may be desirable, depending on the dispute, to involve a senior manager who is familiar with the dispute, so long as he won't end up defending decisions he made earlier.





### ■ Able to Bind the Organization

The mini-trial will work only if both sides know that the senior managers who are present can make decisions which will count. It isn't going to work if the senior managers don't have the authority to bind their organizations. In a contract dispute, the Corps' management representative must have contracting officer authority.

## Selecting the Neutral Advisor

A neutral advisor has been used almost every time the Corps has conducted a successful mini-trial, and they have proved valuable. Although it is not mandatory that a neutral advisor be selected, there are distinct advantages in using a neutral advisor. The advantage of early selection of the neutral advisor is that the neutral advisor may be able to assist in developing the agreement. There may still be some suspicion or even hostility between the parties, and suggestions coming from the neutral advisor may be treated with more openness than those coming from the other side. The neutral advisor can also provide a communication link, if communication between the parties becomes difficult. The neutral advisor can encourage the management representatives to take charge of the mini-trial agreement, to make sure it meets their needs.

The exact role of the neutral advisor can be agreed upon beforehand, or it can be covered in the mini-trial agreement. The original idea of the neutral advisor was to introduce both an impartial opinion and an element of mediation into the proceedings. The history of mini-trials suggests that the negotiation period can be rocky, and the neutral advisor may be able to keep the negotiations moving.

Among the roles which the neutral advisor can play are:

- Point out the strengths and weaknesses of each organization's position.
- Advise the management representatives on how a judge might apply the law.
- Help devise new compromises or redefine the issues in ways which lend themselves to resolution.
- Help bring the parties to the table, and help keep them there.
- Chair the conference and help set the proper procedural ambience for negotiation.
- Help the parties clarify the worth of various claims and derive reasonable prices.
- Deflate unreasonable claims and break down entrenched positions.
- Articulate the rationale for a solution, making it easier for both sides to buy-in than if the rationale were proposed by one of them.

As can be seen from this list, there are several aspects to the neutral advisor's role. The neutral advisor can act like a technical expert or consultant. The neutral advisor can act like an arbitrator in a non-binding arbitration, suggesting what a reasonable outcome might be, but with no authority to bind the parties. Finally, the neutral advisor can act like a facilitator or mediator, helping to keep communication open, clarifying positions, and seeking out new compromises. Clearly the role you decide upon will influence your selection of a mini-advisor.

To date, most neutrals have been retired judges, or law professors with special expertise in the issues under discussion. Technical experts have also been used, where man-



management representatives primarily wanted advice on technical rather than legal issues. In at least one mini-trial, there was a small panel of neutral advisors including an attorney, and two technical experts. Some organizations have also talked of using a mediator as a neutral advisor, putting the emphasis on helping the negotiation process. Since neutral advisors are to be neutral, employees of either of the parties, or anybody else standing to gain from the manner in which the dispute is resolved, cannot be considered.

Among the questions which should be addressed before you decide what kind of neutral advisor you want are:

• Will the neutral advisor assist in developing the mini-trial agreement?

• Will the neutral advisor hold any meetings (formal or informal) between the management representatives prior to the conference?

• Will the neutral advisor preside over the conference?

• What kinds of information do you want from the neutral advisor, and at what point in the conference or negotiation process?

• Do you want the neutral advisor to make recommendations or suggest possible rationales for compromise?

• Will the neutral advisor be present during the negotiations?

• Do you want the neutral advisor to assist with negotiations, or just respond when asked questions?

• Does the neutral advisor play any further role if the initial negotiations are not successful?

The Office of Chief Counsel can provide guidance in selecting an appropriate neutral advisor.

## Developing a Mini-Trial Agreement

The mini-trial agreement spells out all the procedures and groundrules which will be followed during the mini-trial. While the attorneys representing each organization will be very involved in developing the mini-trial agreement because it includes a number of procedural issues which affect them very directly, it is important for senior managers to view the mini-trial agreement as serving their purposes. If you're a senior manager, the mini-trial agreement spells out how you want the information to be gathered and presented for you to make a decision. So you need to take an active role in ensuring that the mini-trial agreement contains those procedures you believe will do the best job of getting you the information you'll need in order to negotiate.

Topics to be covered in the mini-trial agreement include:

### ■ Discovery

Attorneys refer to the process of gathering facts or evidence as "discovery." The purpose of discovery is to find out all the facts the other side has which support its case. It is also designed to ensure there is no surprise evidence. The kind of surprises which used to resolve all the Perry Mason mysteries should not occur in modern litigation. In a mini-trial, the time for discovery is compressed. As a result, it may be necessary to place limits on the number of depositions which will be taken, or the number of interrogatories which attorneys can submit to each other. Responding to discovery requests should not place an undue burden on either party. The agreement might also





include commitments regarding the materials which will be submitted to each other, time schedules for delivery of materials, etc.

### ■ Date, Time, and Place

Setting the date and time of the mini-trial is important because it sets a goal which drives the process. Both parties know how much time they have for discovery and how much time to get their presentations prepared. Time extensions are not permitted except in the most exceptional circumstances.

Ordinarily, the mini-trial is held at a place which is neutral, not clearly identified with either party. This is not an absolute rule, however, as Corps mini-trials have occurred at offices of one of the parties. Comfort is also important. A physical setting can either help both sides be comfortable and more relaxed, or may contribute to a tense atmosphere.

### ■ Participant's Obligation to Present Best Case and Negotiate

The mini-trial agreement usually contains language in which both parties commit to present their best case and negotiate in good faith. The term "best case" implies that the parties will focus in on those issues which are most important and which they think are the strongest points for their positions. It may also mean that attorneys focus on those issues which count the most in resolving the dispute. In a contractual dispute, for example, most of the dollars may turn on just a few points, so these should be the primary focus of the conference. Negotiation "in good faith" means that both parties will make a determined effort to resolve the issue, not just go through the motions, holding back until they are in front of a judge.

### ■ The Role of the Neutral Advisor

As discussed earlier, the neutral advisor can play a variety of roles, so the role of the neu-

tral advisor is usually spelled out in the mini-trial agreement, and it may be useful to involve the neutral advisor in developing the mini-trial agreement. Past experience shows, however, that the role of the neutral advisor often evolves in response to circumstances and the desires of the management representatives. The mini-trial agreement will spell out both parties' expectation of the neutral advisor at the beginning of the process, but there should be some understanding that this may change over time.

### ■ The Name of the Neutral Advisor, (or the Process Which will be Used to Select the Neutral Advisor)

The mini-trial agreement will state the name of the neutral advisor, assuming that the neutral advisor has been selected prior to completion of the agreement. If the neutral advisor has not been selected prior to completion of the agreement, then the agreement should specify how the neutral advisor will be selected.

### ■ The Exchange of Position Papers

Management representatives usually find position papers very helpful in providing a context for the presentations made during the mini-trial. The mini-trial agreement should specify the length and character of the position papers, and the date at which papers will be exchanged. Normally, position papers are limited to 20-25 pages, both because management representatives are not likely to read longer documents, and because it forces both sides to concentrate on the major issues.

### ■ Confidentiality of Statements

Attorneys are anxious to protect their organization's ability to make a strong case in court, so they are worried that statements made in the mini-trial - such as granting the other side's point on a particular issue or indicating a willingness to compromise - may be used against them if the mini-trial does not result in an agreement and the dis-





pute ends up in court. Typically the mini-trial agreement will specify that all of the statements made during the mini-trial are confidential, and cannot be used in court. The agreement also specifies that the neutral advisor cannot be used as a witness, consultant or expert in the dispute or any related dispute.

### ■ Allocation of Expenses

Normally all expenses such as the costs of the neutral advisor or the meeting facilities, are paid for on a 50/50 basis by the participants. All costs of preparing and presenting one's case, and the costs of participation by attorneys, witnesses, or management representatives are carried by the individual organizations.

### ■ Pending Litigation

If there is pending litigation, or the mini-trial comes during an ongoing discovery process, the agreement should specify that both parties are suspending any further litigation or discovery (except that covered by the mini-trial agreement), until after the mini-trial.

### ■ The Roles of People to be Present During the Mini-Trial

As suggested previously, the mini-trial agreement should specify the role of the management representatives, the neutral advisors, and the attorneys making the presentations for the organizations.

### ■ The Number of People in the Room

Often a sizeable staff from the organizations will want to attend, so in order to keep an informal atmosphere it may be necessary to limit the number of people in the room. Such limits should be included in the agreement.

### ■ Schedule/Agenda

One of the most important things in the mini-trial agreement is the schedule and agenda which will be followed during the

mini-trial conference. Here is a rather typical mini-trial conference format:

- Other Party's Opening Statement
- Corps' Opening Statement
- Other Party's Presentation
- Corps' Rebuttal
- Questions from management representatives
- Corps' Presentation
- Other Party's Rebuttal
- Questions from management representatives
- Other Party's closing arguments
- Corps' closing arguments
- Open Question Period
- Neutral Advisor's preliminary opinion

Although this is presented as a "typical" conference agenda, there is considerable variation in how the mini-trial conference can be conducted, and senior managers need to satisfy themselves that the procedure will meet their needs. For example, some mini-trials permit cross-examination of witnesses, although most do not. Not all mini-trials include rebuttal periods. There may or may not be a formal question period following each presentation. Questions from management representatives are normally permitted throughout the presentations, so long as these questions are genuine requests for information or clarification and not efforts to challenge an opponent's position. However, attorneys are normally not permitted to interrupt each other's presentations with questions. Most attorneys want to have opening and closing statements, but they are not mandatory.

It is often desirable to have a neutral person - such as the neutral advisor - preside over the conference, as the two attorneys are going to be anxious to present their strongest case, and will vie to make their points as best they can. Some control over the meet-





ing is usually needed, and if a management representative chairs the conference, he may not be seen as neutral.

Because the mini-trial is a relatively new technique, further experimentation with the conference procedure is appropriate before too many rules are made about how the conference should be conducted. Senior managers are encouraged to develop conference formats which will do the best job of getting them the information they need. Above all, the mini-trial is a flexible technique which should be altered where necessary to meet the need of the organization.

### ■ Termination

Either side may drop out of the mini-trial process, before, during, or after the mini-trial conference. The agreement should specify what notice is required if either party decides to drop out of the process, and what rights and obligations both parties have if this occurs. The termination provision should clearly specify that the language of the mini-trial agreement may not itself become the basis for litigation.

### ■ Other Procedures the Management Representatives Want

As suggested several times earlier, the mini-trial agreement is the vehicle by which the management representatives create the process which will serve them best. As a result, it is not unusual for procedures other than those outlined above to be included in the agreement.

A sample mini-trial agreement for a contract dispute is provided in Appendix I, although this agreement does not include language on all the issues discussed above. This sample agreement can be tailored for other types of disputes.

### ■ Complete Discovery

Once the mini-trial agreement has been signed, the attorneys can complete the dis-

covery process, as defined in the agreement. Although the mini-trial process is a voluntary process, with no judicial penalties if agreements are broken, the terms of the agreement should be observed scrupulously. Violations of the agreement during the discovery stage will usually poison the atmosphere between the parties sufficiently to doom the mini-trial to failure.

### ■ Exchange Position Papers

The parties will then exchange position papers, observing the scope and length requirement specified in the mini-trial agreement, and the schedule for exchange of papers.

### ■ Preliminary Meeting with Neutral Advisor

Some neutral advisors like to have a meeting, or dinner, attended by both management representatives, prior to the mini-trial conference. The purpose of this meeting is not to discuss the content of the issues, but to get to know each other and discuss the procedures which will be followed. Most of all, the meeting allows these key figures in the mini-trial to begin to get comfortable with each other and the procedure before the mini-trial conference.

### ■ Conduct the Mini-Trial Conference

The mini-trial conference will follow the agenda shown in the mini-trial agreement, except that it can be changed at any time by mutual agreement of the management representatives. The attorneys are given great leeway in how they make their presentations. They may choose to make the entire presentation themselves, or present experts or witnesses. They may choose to use visuals, slides, exhibits, or even movies. The whole idea is that each attorney gets a chance to make his best case, anyway he wants within the limited time available to him.

Although there is generally great freedom



in the presentations, both attorneys need to be aware that in order for there to be any payment from the government, there must first be a legal basis for any costs, expenses, or injuries which are claimed. This could require the testimony of auditors, or other evidence of actual cost.

### ■ The Negotiation Process

Once the conference is over, and the management representatives have asked all their questions, the management representatives adjourn to another room to begin negotiations. Depending on the role defined for him, they may be accompanied by the neutral advisor. No other attorneys or staff are normally present for the negotiations. Once in the negotiation room, the management representatives may conduct the negotiations any way they want. Usually the negotiations are relatively informal. Either representative can leave the room to request information of his own staff, or review legal points. If both management representatives decide they want to hear additional presentations on specific points, they can request it.

It is not necessary to resolve the issue in a single session. Some mini-trials have resulted in agreements in principle within 30 minutes, while others have involved several negotiation sessions, spread over several days.

There are skills to negotiation, and the Corps provides training in negotiation skills. The Corps can also provide technical assistance to Corps managers, or even to the other party, on how to structure the negotiation process. As suggested earlier, in negotiation it helps if both people are skilled in the negotiation process.

To date, every time the Corps has used a mini-trial, a negotiated settlement has been reached.

### ■ Documentation

Frequently the management representatives will develop an agreement in principle, then request the attorneys to prepare more detailed agreements implementing the agreement. This agreement in principle should be put in writing, with copies given to both parties, to be used as guidance by the attorneys. The management representatives' agreement in principle also can be referred to in case there are later questions about the intent of the formal agreement.

Even though the mini-trial results in a mutual agreement, the Corps is still obligated to document the basis for the agreement to the same standards as any other settlement.

## Conclusion

Mini-trials are one of a number of promising ADR techniques. Because the field of ADR is new, many techniques are still undergoing refinement and change. Corps managers are encouraged to approach the use of mini-trials with a spirit of innovation. One of the primary advantages of the technique is that it can be structured to serve the needs of the managers who must make the decisions.









# Other Resources

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Collins, Richard

**The Goodyear Mini-Trial: Corps ADR Case Study #1**  
Institute for Water Resources, Fort Belvoir, VA, 1989

Crowell, Eldon H. and Charles Pou, Jr.

**Appealing Government Contract Decisions: Reducing the Cost and Delay  
of Procurement Litigation**  
Administrative Conference of the United States, Washington D.C., January 1988

Edelman, Lester and Frank Carr

**The Mini-Trial: An Alternative Dispute Resolution Procedure**  
The Arbitration Journal, March 1987, Vol. 42, No. 1.

**Mini-Trial Practice Guide**

Center for Public Resources

New York, N.Y., September 1988

Henry, James F. and Jethro K. Lieberman

**The Manager's Guide to Resolving Legal Disputes: Better Results Without Litigation**  
Harper & Row, New York, 1985









# Appendix I: Sample Agreement

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MINI-TRIAL AGREEMENT  
BETWEEN THE  
UNITED STATES ARMY CORPS OF ENGINEERS  
AND

\_\_\_\_\_  
(Contractor)

This mini-trial agreement dated this \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_ is executed  
by \_\_\_\_\_, on behalf of the "Corps", and by \_\_\_\_\_  
on behalf of \_\_\_\_\_, hereinafter referred to as \_\_\_\_\_ (name).

HEREAS: On the \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_, the parties hereto entered  
into Contract No. \_\_\_\_\_ for the \_\_\_\_\_

HEREAS, under the Disputes Clause (General Provision No. 4) of that contract, Appellant on  
\_\_\_\_\_, 19 \_\_\_\_ filed a claim with the contracting officer alleging \_\_\_\_\_

HEREAS, Appellant certified its claim in accordance with the requirements of the Contract Disputes Act of  
1978;

HEREAS, in a letter dated \_\_\_\_\_, 19 \_\_\_\_ the contracting officer issued a final  
decision denying appellant's claim;

HEREAS, on \_\_\_\_\_, 19 \_\_\_\_ Appellant appealed the contracting officer's final  
decision to the \_\_\_\_\_ Board of Contract Appeals where the appeal has been docketed as  
ASBCA) (ENG BCA) No. \_\_\_\_\_;

HEREAS, the Corps has instituted an Alternative Contract Disputes Resolution Procedure known as a "Mini-  
trial", which procedure provides the parties with a voluntary means of attempting to resolve disputes without



the necessity of a lengthy and costly proceeding before a Board of Contract Appeals and without prejudicing such proceeding; and

WHEREAS, the Corps and Appellant have agreed to submit (ASBCA) (ENG BCA) No. \_\_\_\_\_ to a "Mini-Trial".

NOW THEREFORE, subject to the terms and conditions of this "Mini-Trial" agreement, the parties mutually agree as follows:

1. The Corps and Appellant will voluntarily engage in a non-binding mini-trial on the claim of \_\_\_\_\_ that it is entitled to \_\_\_\_\_

The mini-trial will be held on \_\_\_\_\_, 19 \_\_\_\_ at \_\_\_\_\_.

2. The purpose of this mini-trial is to inform the principal representatives of the position of each party on the claim and the underlying bases of such. It is agreed that each party will have the opportunity and responsibility to present its "best case" on entitlement and quantum.

3. The principal representatives for the purpose of this mini-trial will be \_\_\_\_\_ for the Corps, and \_\_\_\_\_

for appellant. The principal representatives have binding authority to settle the dispute. Each party will present its position to the principal representatives through a trial attorney(s). In addition, \_\_\_\_\_ will attend as a mutually selected "neutral advisor".

4. The role of the neutral advisor is that of an advisor. The neutral advisor will/will not preside at the mini-trial conference. The neutral advisor may ask questions of witnesses only if mutually agreed to by the principal representatives. Upon request by either representative, the neutral advisor will provide comments as to the relative strengths and weakness of that party's position. The neutral advisor will/will not attend the negotiation session with the representatives following the conference.

5. The Government trial attorney will provide the neutral advisor with copies of this agreement and the Rule 4 appeal assembly. Other source materials, statements, exhibits and depositions may be provided to the neutral advisor by the trial attorneys, but only after providing the same materials to the other trial attorney. Neither trial attorney shall conduct ex parte communications with the neutral advisor.

6. The fees and expenses of the neutral advisor shall be borne equally by both parties. Except for the costs of the neutral advisor, all costs incurred by either party in connection with the mini-trial proceedings shall be borne by that party, and shall not be treated as legal costs for apportionment in the event that the dispute is not resolved, and proceeds to a Court or Board determination.





7. Unless completed prior to the execution of this agreement, the parties will enter into a stipulation setting forth a schedule for discovery to be taken and completed \_\_\_\_\_ weeks prior to the mini-trial conference. Discovery taken during the period prior to the mini-trial shall be admissible for all purposes in this litigation, including any subsequent hearing before any Board or competent authority in the event this mini-trial does not result in a resolution of this appeal. It is agreed that the pursuit of discovery during the period prior to the mini-trial shall not restrict either party's ability to take additional discovery at a later date. In particular, it is understood and agreed that partial depositions may be necessary to prepare for the mini-trial. If this matter is not resolved informally as a result of this procedure, more complete depositions of the same individuals may be necessary. In such case the partial depositions taken during this interim period shall in no way foreclose additional depositions of the same individual into the same or additional subject matter for a later hearing date before a Court or Board.

8. No later than \_\_\_\_\_ weeks prior to commencement of the mini-trial conference, \_\_\_\_\_ shall submit to the Corps a quantum analysis which identifies the costs associated with the issues that will arise during the conference.

9. The presentations at the mini-trial conference will be informal. The rules of evidence will not apply, and witnesses may provide testimony in the narrative. The principal representatives may ask any question of the witnesses that they deem appropriate.

10. At the mini-trial conference, the trial attorneys have the discretion to structure the presentation as desired. The form of presentation may be through expert witnesses, audio visual aids, demonstrative evidence, depositions and oral argument. The parties agree that stipulations will be utilized to the maximum extent possible. Any complete or partial depositions taken in connection with the litigation in general, or in contemplation of the mini-trial proceedings, may be introduced at the mini-trial as information to assist the principal representatives understanding of the various aspects of the parties' respective positions. The parties may use any type of written material which will further the progress of the mini-trial conference. The parties may, if desired, no later than \_\_\_\_\_ weeks prior to commencement of the conference, submit to the representative(s) for the opposing side(s), as well as the neutral advisor, a position paper of no more than 25 - 8 1/2 X 11 double spaced pages. No later than \_\_\_\_\_ week(s) prior to commencement of the mini-trial conference, the parties will exchange copies of all documentary evidence proposed for utilization at the conference, inclusive of a listing of all witnesses.

11. The mini-trial conference shall take \_\_\_\_\_ day(s). The morning's proceedings shall begin at \_\_\_\_\_ a.m. and shall continue until \_\_\_\_\_ a.m. The afternoon's proceedings shall begin at \_\_\_\_\_ p.m. and continue until \_\_\_\_\_ p.m.





A sample two day schedule follows:

### MINI-TRIAL CONFERENCE SCHEDULE

#### Day 1

8:00 a.m. - 8:30 a.m.	Appellant's opening statement.
8:30 a.m. - 12:00 noon	Appellant's position & case presentation.
12:00 noon - 1:00 p.m.	Lunch*
1:00 p.m. - 2:30 p.m.	Corps' rebuttal.
2:30 p.m. - 4:00 p.m.	Appellant's re-examination.
4:00 p.m. - 5:00 p.m.	Open question & answer period.

#### Day 2

8:00 a.m. - 8:30 a.m.	Corps' opening statement.
8:30 a.m. - 12:00 noon	Corps' position & case presentation.
12:00 noon - 1:00 p.m.	Lunch*
1:00 p.m. - 2:30 p.m.	Appellant's rebuttal.
2:30 p.m. - 3:00 p.m.	Corps' re-examination.
3:00 p.m. - 4:30 p.m.	Open question and answer period.
4:30 p.m. - 4:45 p.m.	Appellant's closing argument.
4:45 p.m. - 5:00 p.m.	Corps' closing argument.

\* Flexible time period for lunch of a stated duration.

12. Following the conclusion of the mini-trial conference, the principal representatives should meet, or confer, as often as they shall mutually agree might be productive for resolution of the dispute. If the parties are unable to resolve the dispute within \_\_\_\_\_ days, the mini-trial shall be deemed terminated and the litigation will continue.

13. No transcript or recording shall be made of the mini-trial conference. Except for discovery undertaken in connection with this appeal, all aspects of the mini-trial including, without limitation, all written material prepared specifically for utilization at the mini-trial, or oral presentations made between or among the parties and/or the advisor at the mini-trial are confidential to all persons, and are inadmissible as evidence, whether



not for purposes of impeachment, in any pending or future court or Board action which directly or indirectly involves the parties and this matter in dispute. However, if settlement is reached as a result of the mini-trial, any and all information prepared for, and presented at the proceedings may be used to justify and document the subsequent settlement modification.

furthermore, evidence that is otherwise admissible shall not be rendered inadmissible as a result of its use at the mini-trial.

4. The neutral advisor will be instructed to treat the subject matter of this proceeding as confidential, and refrain from disclosing any of the information exchanged to third parties. The neutral advisor is disqualified as witness, consultant or expert for either party in this and any other dispute between the parties arising out of performance of Contract No. \_\_\_\_\_.

5. Each party has the right to terminate the mini-trial at any time for any reason whatsoever.

6. Upon execution of this mini-trial agreement, if mutually deemed advisable by the parties, the Corps and Appellant shall file a joint motion to suspend proceedings of this appeal before the \_\_\_\_\_ Board of Contract Appeals. The motion shall advise the Board that the suspension is for the purpose of conducting a mini-trial. The Board will be advised as to the time schedule established for completing the mini-trial proceedings.

ated \_\_\_\_\_  
\_\_\_\_\_  
*Principal representative for Corps*

Dated \_\_\_\_\_  
By \_\_\_\_\_  
*Principal representative for appellant*

\_\_\_\_\_  
*Attorney for the Corps*

\_\_\_\_\_  
*Attorney for Appellant*

NOTE: This agreement reflects a mini-trial which involves a neutral advisor. In the event a neutral advisor is not used, you should eliminate all reference to the neutral advisor.





## REPORT DOCUMENTATION PAGE

Form Approved  
OMB No 0704-0188  
Exp. Date Jun 30, 1986

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This study describes the "Mini-Trial", one of a number of Alternative Dispute Resolution (ADR) techniques which the U.S. Army Corps of Engineers is using in an effort to reduce the number of disputes requiring litigation. The study describes the technique is, how it has been used, and then offers guidance on how to go about conducting mini-trials.			
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APPENDIX 5

SOUTH ATLANTIC DIVISION,  
U.S. ARMY CORPS OF ENGINEERS,  
DRAFT PROCEDURES FOR  
THE DISPUTES REVIEW BOARD



## SPECIAL PROVISION

### ALTERNATIVE DISPUTES REVIEW PROCESS

In order to assist in the resolution of disputes or claims arising out of this project, this contract clause establishes an Alternative Disputes Review process. A Disputes Review Board is being added to the disputes resolution process to be brought into play by mutual agreement of the parties when normal Government Contractor dispute resolution is unsuccessful. The Disputes Review Board will consider disputes referred to it and will provide non-binding recommendations to assist in the resolution of the differences between the Government and Contractor. The following alternative procedure may be used for dispute resolution. Specific procedures to be followed for disputes referred to the Disputes Review Board are set forth at Corps of Engineer Circular No. \_\_\_\_.

1. If the Contractor objects to any oral decision or order of the Contracting officer, the Contractor shall request in writing a written decision or order from the Contracting Officer.

2. After receipt of the Contracting Officer's written decision or order the Contractor shall, if he objects to such decision or order, file a written protest with the Contracting Officer, stating clearly and in detail the basis of the objection. The Contracting Officer will consider any written protest and make his preliminary Contracting Officer's decision on the basis of the pertinent contract provisions and facts and circumstances involved in the dispute. Should the Contractor object to the Contracting Officer's preliminary



decision, the matter can either be referred to the Disputes Review Board by mutual agreement of the Government and the Contractor, or the Contractor may request that the Contracting Officer issue a final decision on the matter, from which the contractor may pursue an appeal in accordance with the "Disputes" clause of the contract.

3. In the event the Government and the Contractor mutually agree to submit the dispute to the Disputes Review Board, the request for review must be instituted within 30 days of the date of receipt of the Contracting Officer's preliminary decision. Pending review by the Disputes Review Board of a dispute, the Contractor shall diligently proceed with the work as previously directed.

4. The Contractor and the Government shall each be afforded an opportunity to be heard by the Disputes Review Board and to offer evidence. The Disputes Review Board recommendations toward resolution of a dispute will be given in writing to both the Government and the Contractor within 30 days following conclusion of the proceedings before the Disputes Review Board.

5. Within 30 days of receiving the Dispute Review Board's recommendations, both the Government and the Contractor shall respond to the other in writing signifying that the dispute is either resolved or remains unresolved. If the Government and the Contractor are able to resolve their dispute, the Government will expeditiously process any required contract modifications. Should the dispute remain unresolved after 30 days following receipt of the Board's recommendations, the Contracting Officer will issue his final decision on the matter in dispute, and the contractor will be entitled to pursue an appeal in accordance with the "Disputes" clause of the contract.





## ALTERNATIVE DISPUTES REVIEW PROCESS

EC \_\_\_\_\_

### DISPUTES REVIEW BOARD

1. Purpose. The Disputes Review Board is an advisory body which may be created by mutual agreement of the Government and the Contractor for a particular construction project. The Board's function will be to assist in the resolution of claims, disputes or controversy between the Contractor and the Government. Any recommendations made by the Board will be advisory, and will not be binding upon either party.
2. Applicability. This circular applies to all HQ USACE/OCE elements and all FOA processing contract appeals pending before the ENG BCA or ASBCA.
3. Reference. EFARS Appendix N, "Contract Requests, Contract Disputes Claims and Appeals".
4. General.
  - a. Definition. The Disputes Review Board process is a voluntary, expedited and non-judicial and non-binding mediation procedure, whereby an independent three-party Board is established to evaluate contract disputes and provide recommendations to the Corps and its contractor with the objective of resolving disputes.
  - b. The Board will consider disputes referred to it, and will furnish recommendations to the Government and Contractor to assist in the resolution of



the differences between them. The Board will essentially be acting in the role of mediator, providing special expertise to assist and facilitate the resolution of disputes.

#### 5. Board Membership.

a. The Disputes Review Board shall consist of one member selected by the Government and one member selected by the Contractor. The first two members shall be mutually acceptable to both the Government and the Contractor. The parties shall exchange lists of three individuals acceptable as a Board member. The Corps and the Contractor shall each select one individual from the other's list. If no individual on the first list is acceptable to the other party, a second list with three individuals will be proposed. If no one on the second list is acceptable to the other party, the selection process shall not continue and the mutual decision to submit the dispute to a Disputes Review Board shall be considered terminated.

b. The two members acceptable to the Government and the Contractor will independently select the third member from a list of 20 names developed by the Government of individuals respected in the field of engineering for their ability and integrity, one of whom should be acceptable. If the two members are unable to select the third member from this list, the decision to submit the dispute to a Disputes Review Board shall be considered terminated.

c. No member shall have a financial interest in the contract, except for payment for services on the Disputes Review Board. Except for fee-based consulting services on other projects, no Board member shall have been employed by either party within a period of two years prior to award of the contract.



## Selection of the Disputes Review Board Procedure.

If the parties mutually agree that a Disputes Review Board should be established for work performed under a contract, the Government and the Contractor shall negotiate an agreement with their member within 60 calendar days after execution of the contract. The selection of the Disputes Review Board Alternative Disputes Review procedure for resolution of contract disputes shall be void if the two members are unable to select a third member within 30 calendar days.

## Procedure for Submitting a Dispute to the Board.

- a. If the Contractor objects to any oral decision or order of the Contracting Officer, the Contractor shall request in writing a written decision or order from the Contracting Officer.
- b. After receipt of the Contracting Officer's written decision or order the Contractor shall, if he objects to such decision or order, file a written protest with the Contracting Officer, stating clearly and in detail the basis of the objection. The Contracting Officer will consider any written protest and make his preliminary Contracting Officer's decision on the basis of the pertinent contract provisions and facts and circumstances involved in the dispute. Should the Contractor object to the Contracting Officer's preliminary decision, the matter can either be referred to the Disputes Review Board by mutual agreement of the Government and the Contractor, or the Contractor may





request that the Contracting Officer issue a final decision on the matter, from which the Contractor may pursue an appeal in accordance with the "Disputes" clause of the contract.

c. In the event the Government and Contractor mutually agree to submit the dispute to the Disputes Review Board, the request for review must be instituted within 30 days of the date of receipt of the Contracting Officer's preliminary decision. Pending review of the Disputes Review Board of a dispute, the Contractor shall diligently proceed with the work as previously directed.

d. The Contractor and the Government shall each be afforded an opportunity to be heard by the Disputes Review Board and to offer evidence. The Disputes Review Board shall submit in writing recommendations towards factual (as opposed to legal) resolution of a dispute to both the Government and the Contractor within 30 days following conclusion of the proceedings before the Disputes Review Board.

e. Within 30 days of receiving the Dispute Review Board's factual recommendations, both the Government and the Contractor shall respond to the other in writing signifying that the dispute is either resolved or remains unresolved. If the Government and the Contractor are able to resolve their dispute, the Government will expeditiously process any required contract modifications. Should the dispute remain unresolved after 30 days following receipt of the Board's recommendations, the Contracting Officer will issue his final decision on the matter in dispute, and the contractor will be entitled to pursue an appeal in accordance with the "Disputes" clause of the contract.



c. For further description of work, responsibilities and duties of the Disputes Review Board, and the Government and Contractor's obligations and responsibilities with respect to each other and to the Disputes Review Board, see the "Disputes Board Three Party Agreement" as set forth in Appendix "A" hereto.

9. Expenses of the Board and Board Members.

Compensation for the Disputes Review Board members, and the expenses of operation of the Board, shall be shared by the Government and Contractor in accordance with the following:

- a. The Government will compensate directly the wages and travel expense for its selected member.
- b. The Contractor shall compensate directly the wages and travel expense for its member.
- c. The Government and Contractor will share equally in the third member's wages and travel, and all other expenses of the Board.
- d. The Government at its expense will provide administrative services, such as conference facilities and secretarial services, to the Board.

10. Three Party Agreement.

- a. The Contractor, the Government and all three members of the Board shall execute the "Disputes Review Board Three Party Agreement" within 30 calendar days following the final selection of third member.
- b. The "Disputes Review Board Three Party Agreement" and the "Disputes Review Board Guidelines" to said Agreement are set forth below.



APPENDIX A  
DISPUTES REVIEW BOARD  
THREE PARTY AGREEMENT

THIS THREE PARTY AGREEMENT, made and entered into this \_\_\_\_\_ day  
of \_\_\_\_\_, 1985, between:

the United States Army Corps of Engineers, acting through the Contracting  
Officer of the U. S. Army Engineer District, \_\_\_\_\_, hereinafter  
called the CORPS; the \_\_\_\_\_ company, hereinafter called the "CONTRACTOR,"  
and the Disputes Review Board, hereinafter called the "BOARD"; and consisting of  
three members, Mr. \_\_\_\_\_; Mr. \_\_\_\_\_, and  
Mr. \_\_\_\_\_

WITNESSETH that,

WHEREAS, the Corps is now engaged in the construction of \_\_\_\_\_; and

WHEREAS, the \_\_\_\_\_ contract includes a provision  
authorizing upon the mutual agreement of both the CORPS and the CONTRACTOR for  
the establishment and operation of a "Disputes Review Board" to assist in  
resolving disputes and claims; and

WHEREAS, the Board is composed of three members, one selected by the CORPS, one  
selected by the CONTRACTOR and the third member selected by these two;

NOW THEREFORE, in consideration of the terms, conditions, covenants and  
performance contained herein, or attached and incorporated and made a part  
hereof, the parties agree as follows:





## I

### DESCRIPTION OF WORK

order to assist upon mutual agreement by the CORPS and the CONTRACTOR in the resolution of disputes and claims between the CONTRACTOR and the CORPS, the Corps has provided for the establishment of a Disputes Review Board. The intent of the BOARD is to fairly and impartially consider any disputes mutually placed before it, and to provide written non-binding factual (as opposed to legal) recommendations for resolution of such disputes to both the CORPS and the CONTRACTOR. The members of the BOARD shall perform all services necessary to participate in the BOARD's actions in accordance with the following Scope of Work.

## II

### SCOPE OF WORK

The Scope of Work of the BOARD includes, but is not limited to, the following items of work.

#### Procedures.

Prior to consideration of an appeal, the BOARD shall establish rules that will govern the conduct of its business, and reporting procedures based upon guidelines which are attached as an Appendix "B" to this AGREEMENT. The BOARD's factual recommendations, resulting from their consideration of a dispute or claim, shall be furnished in writing to the CORPS and the CONTRACTOR. The recommendations shall be based on the pertinent contract provisions and facts and circumstances involved in the dispute.



#### B. Construction Site Visits

The members as a BOARD shall visit the project site at least quarterly to keep abreast of construction activities and to develop a familiarity for the work in progress. More frequent site visits may be warranted. The frequency, exact time and duration of these visits shall be as mutually agreed between the CORPS, the CONTRACTOR and the BOARD.

#### C. BOARD Consideration of a Dispute or Claim

In the event of a claim or dispute, the CORPS and the CONTRACTOR may mutually agree to submit such claim or dispute to the BOARD. Upon receipt by the BOARD of a written claim or dispute, the BOARD shall convene to review and consider the matter. Both the CORPS and the CONTRACTOR shall be given the opportunity to present their evidence at these meetings. It is expressly understood that the BOARD members are to act impartially and independently in consideration of the contract provisions and the facts and conditions surrounding any written claim or dispute presented by the CORPS or the CONTRACTOR. The BOARD's factual recommendations concerning any such claim or dispute are advisory and non-binding upon both the CORPS and the CONTRACTOR.

#### D. Time and Place of Board Meetings.

The time and location of BOARD meetings shall be determined by the BOARD.



### III

#### CONTRACTOR RESPONSIBILITY

The CONTRACTOR shall furnish one copy of all pertinent documents it might have, other than those furnished by the CORPS, which are or may become pertinent to the performance of the BOARD. Pertinent documents are any drawings or sketches, calculations, procedures, schedules or estimates or other documents which are used in the performance of the work or in justifying or substantiating the Contractor's position.

### IV

#### CORPS RESPONSIBILITIES

The CORPS shall furnish the following services and items.

##### Contract Related Documents

The CORPS shall furnish the BOARD three copies of the Contract documents, change orders, written instructions issued by the CORPS to the CONTRACTOR or other documents pertinent to the performance of the contract and therefore, necessary to the BOARD'S work.

##### Coordination and Services

The CORPS Contracting Officer for the \_\_\_\_\_ contract will, in cooperation with the CONTRACTOR, coordinate the operations of the BOARD. The





CORPS, acting through the Contracting Officer, will arrange or provide conference facilities at or near the contract site and provide secretarial and copying services.

#### BOARD Cost Records

The Board will maintain complete cost records for the CORPS and CONTRACTOR shared expenses of the BOARD, and these records will be available for inspection by either party. Shared expenses include the third member's wages and travel expense, local lodging and subsistence for the third BOARD member, and direct non-salary costs associated with BOARD operations. Excluded from these records are the wages and travel expense of the CORPS and CONTRACTOR selected members of the BOARD.

#### V

#### COMPENSATION

CORPS and CONTRACTOR Appointed Members' Payment for services rendered as CORPS and CONTRACTOR members of the BOARD will be at the rates agreed to between the CORPS and the CONTRACTOR and their respective BOARD members, but shall not exceed per day, plus travel and per diem calculated as set forth below for the third BOARD member. Payment shall be made under separate agreement between the parties.

Fee - Third Appointed Member. Payment for services rendered by the third member of the BOARD shall be at the daily billing rate of \$ \_\_\_\_\_, including travel time. This daily rate includes all direct labor costs, overhead and



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Fee - Third Appointed Member. Payment for services rendered by the third member of the BOARD shall be at the daily billing rate of \$ \_\_\_\_\_, including travel time. This daily rate includes all direct labor costs, overhead and



profit. Travel and subsistence expenses will be reimbursed at the actual cost, but shall not exceed the allowable amounts as provided by the Government's Joint Travel Regulations in effect at the time the expenses are incurred.

**Direct Non-Salary Costs.** Direct non-salary costs of the BOARD will be reimbursed at the actual cost to the BOARD. These charges may include, but are not limited to; printing, long distance telephone supplies, etc. The billing for non-salary costs, directly identifiable with the project, shall be an itemized listing of the charges supported by the original bills, receipts, expense accounts and miscellaneous supporting data retained by the BOARD members. Copies of the original supporting documents shall be supplied to the parties upon request.

**Maximum Total Amount Payment.** The maximum total amount payable under this AGREEMENT for the third member's fee and travel costs, and the BOARD's direct non-salary costs, shall not exceed \$ \_\_\_\_\_, unless a prior supplemental AGREEMENT has been negotiated and executed by the CORPS and the CONTRACTOR.

**Payments.** The BOARD may submit invoices to the CORPS for partial payment for work completed by the BOARD and the third BOARD member not more often than once per month during the progress of the work. Such invoices shall be accompanied by a general description of activities performed during the billing period. The value of the work accomplished for partial payment shall be established by the billing from the Third BOARD member, and itemized direct non-salary costs incurred by the Board. The CORPS and the CONTRACTOR will each pay directly to the BOARD one-half of the costs incurred by BOARD, and directly to the third BOARD member one-half of invoices billed.





Inspection of Cost Records. The BOARD shall keep available for inspection by representatives of the CORPS for a period of three years after final payment the cost records and accounts pertaining to this AGREEMENT.

## VI

### TERMINATION OF AGREEMENT

The parties to this AGREEMENT mutually agree that this AGREEMENT may be terminated at any time by written notice to the other party. BOARD members may withdraw from the BOARD by providing notice. BOARD members may be terminated for cause only by their original appointor. Therefore, the CORPS may only terminate the CORPS appointed member, the CONTRACTOR may only terminate the CONTRACTOR appointed member, and the first two members must mutually agree to terminate the third member.

## VII

### LEGAL RELATIONS

The parties hereto mutually understand and agree that the third BOARD member in the performance of his duties on the BOARD is acting in the capacity of an independent agent and not as an employee of either the CORPS or the CONTRACTOR.

## VIII

### DISPUTES

Any dispute between the parties hereto, arising out of the work or other terms of this AGREEMENT, which cannot be resolved by negotiation and mutual concurrence between the parties, shall render this AGREEMENT terminated.



In WITNESS WHEREOF, the parties hereto have executed this AGREEMENT as of the day and year first above written.

BOARD MEMBER

By: \_\_\_\_\_

Title: \_\_\_\_\_

BOARD MEMBER

By: \_\_\_\_\_

Title: \_\_\_\_\_

BOARD MEMBER

By: \_\_\_\_\_

Title: \_\_\_\_\_

UNITED STATES ARMY CORPS OF ENGINEERS

\_\_\_\_\_ District

CONTRACTOR

By: \_\_\_\_\_

Title: \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_



APPENDIX B  
CONTRACT DISPUTES REVIEW BOARD  
GUIDELINES

I.

OBJECTIVE

The principal objective of the Disputes Review Board (BOARD) is to assist in the resolution of disputes which would otherwise likely be resolved through the traditional litigative processes. If this objective is achieved, such disputes can be resolved promptly, with minimum expense, and with minimum disruption to the administration and performance of the work. It is not intended for the GOVERNMENT or the CONTRACTOR to default on their normal responsibility to amicably and fairly settle their differences by indiscriminately assigning disputes to the BOARD. It is intended that if mutually agreed to by the parties to constitute a Disputes Review Board for the purpose of attempting to resolve contract disputes, that the mere existence of the BOARD will encourage the CORPS and the CONTRACTOR to resolve potential disputes without the necessity of resorting to the formal appeal procedure under the "Disputes" clause of the contract.

II.

RESPONSIBILITY OF THE BOARD

A. The Board will engage in a non-binding mediation of disputes or controversy between the CONTRACTOR and the CORPS from construction arising under the contract. Primarily, the BOARD will consider claims and disputes involving





interpretation of the Plans and/or Specifications, delays, acceleration of the work, scheduling, classification of extra work, changed conditions, design changes, and the like. During its regular visits to the job site, the BOARD will encourage the settlement of differences at the job level.

Other than by formal factual recommendations to both the CORPS and the CONTRACTOR, the BOARD will refrain from giving any advice or consultative services to either party. The BOARD members will act in a completely independent manner and will have no consultative or business connections with either party.

Normally, the third BOARD member selected by the first two will act as chairman for all activities. However, he may delegate this post to another member from time to time.

### III

#### REGULAR CONSTRUCTION PROGRESS MEETINGS

All regular meetings will be held at or near the job site. Each meeting will consist of a round table discussion and a field inspection of the work being performed. The round table discussion will be conducted by a member of the CORPS and will be attended by selected personnel from the CORPS and the CONTRACTOR. The agenda will generally be as follows:

Opening remarks by the CORPS Representative.

A description by the CORPS of work accomplished since the

last meeting, the current status of the work, schedule-wise, and

a forecast for the coming period.



3. An outline, by the CONTRACTOR, of potential problems and a description of proposed solutions.
  4. An outline by the CORPS' Contracting Officer, or his authorized representative, as to the status of the work as he views it including potential problems and proposed solutions.
  5. A brief description of potential claims or disputes which have surfaced since the last meeting.
  6. A summary of the status of past disputes and claims.
- ...
3. The CORPS will prepare minutes of all regular meetings and circulate them for revision and/or approval by all concerned.
  4. The field inspection will cover all active segments of the work, the Board being accompanied by both the CORPS and CONTRACTOR personnel.

#### IV

#### HANDLING OF WRITTEN APPEALS

1. When a written appeal is referred to the BOARD by either party, it shall first decide when to conduct a hearing. For an urgent matter the BOARD should convene at its earliest convenience. All hearings shall commence no later than 10 days following transmittal of a dispute to the BOARD.
2. The BOARD may request that written documentation and arguments from both parties be sent to each individual member for study before the hearing begins.



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C. Normally, the hearing will last no more than 2 days, and would be conducted at the job site. However, any location which would be more convenient to all parties and still provide all required facilities and access to necessary documentation would be satisfactory.

D. For hearings, the third member of the BOARD will act as Chairman, or he may appoint one of the other members. The CORPS and the CONTRACTOR shall have representatives at all hearings. The party initiating the dispute to the BOARD will discuss the dispute followed by the other party, each party being allowed equal time. Each party will then be allowed one or more rebuttals until all aspects are thoroughly covered. Each time a person testifies the BOARD members may ask questions, request clarification, or ask for further data. In large or complex cases more than two days of additional hearings may be necessary in order to consider all the evidence presented by both parties. However, no hearing on any single dispute will last for more than 4 calendar days.

E. After the hearings are concluded, the BOARD shall meet in private and reach a conclusion supported by two or more members. Its factual (as opposed to legal) findings and recommendations, together with its reasons, shall then be submitted as a written report to both the CORPS and the CONTRACTOR within 30 days following completion of the hearings. The Board's recommendations shall be based on the pertinent contract provisions and facts and circumstances involved in the dispute.

F. The BOARD should make every effort to reach a unanimous decision. If this proves impossible, the dissenting member may prepare a minority report.



G. Although both parties should place weight upon the BOARD's recommendations, they are not binding. Either party may appeal a recommendation to the BOARD for reconsideration. However, if the BOARD's recommendations do not resolve the dispute, all records, and written recommendations, including any minority reports, will be admissible in any subsequent litigation involving the dispute at issue.

H. It may not be necessary for the BOARD to keep a formal record of its sessions during the consideration of a dispute. This would depend partly upon the nature and magnitude of the dispute and upon the attitude of the parties.

#### V.

#### MISCELLANEOUS

It is not desirable to adopt hard and fast rules for the functioning of the BOARD. The entire procedure should be kept flexible so that it can adapt to changing situations. The BOARD should initiate, with the other parties' concurrence, new rules or modifications to old ones whenever this is deemed necessary. It is desirable to keep the hearings informal.



APPENDIX 6

ARBITRATION AGREEMENT

BETWEEN

U.S. ARMY CORPS OF ENGINEERS, FORT DRUM, NEW YORK

AND

MORRISON - KNUDSON





## ALTERNATIVE DISPUTES RESOLUTION AGREEMENT

THIS ALTERNATIVE DISPUTE RESOLUTION AGREEMENT is dated this 19th day of March, 1990, between the United States Army Corps of Engineers (the "Corps") and Black River Constructors, a joint venture of Morrison-Knudsen Company, Inc., Martin K. Eby Construction Company, Inc. and Huber, Hunt and Nichols, Inc. (collectively, "BRC").

### R E C I T A L S

The Corps and BRC are parties to Contract DACA-51-87-C-0125 executed on April 22, 1987, known as the Ft. Drum Expansion Program (the "Contract"). BRC is a joint venture organized by Morrison-Knudsen Company, Inc., Martin K. Eby Construction Company, Inc. and Huber, Hunt and Nichols, Inc. to pursue the work under the Contract. Morrison-Knudsen Company, Inc., is the sponsoring joint venture partner of BRC and is authorized to enter into this Agreement on its behalf.

Disputes have arisen under the Contract; claims have been filed with the Corps by BRC on its own behalf and on behalf of various subcontractors; the parties anticipate that additional claims will be filed in the near future (collectively, the "Claims").

Although the Corps and BRC have attempted to settle their disputes and the Claims through negotiation, many remain unresolved. The parties desire to make every effort voluntarily to settle the Claims and thereby avoid lengthy and costly proceedings before the Armed Services Board of Contract Appeals and the U.S. Claims Court, but without prejudicing the parties' right to pursue litigation if the Claims cannot be settled by mutual consent.

The Corps has initiated an Alternative Dispute Resolution Program intended to explore alternatives to litigation to resolve contract claims. A variety of voluntary



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The Corps has initiated an Alternative Dispute Resolution Program intended to explore alternatives to litigation to resolve contract claims. A variety of voluntary



procedures are available to aid disputants in reaching settlement, including a non-binding Disputes Review Panel. Accordingly, the Corps and BRC have agreed to establish a Disputes Review Panel (the "Panel") and submit the Claims to the Panel for a written report including a non-binding recommendation intended to guide the parties in settlement negotiations. The procedure for the submission of the Claims to the Panel is set forth in this Agreement.

NOW, THEREFORE, it is agreed:

1. Submission of Claims; Non-Binding Proceeding. The Corps and BRC agree that unresolved Claims, including those of subcontractors of BRC, arising out of the Contract will be submitted to the Panel for a non-binding recommendation in accordance with the terms of this Agreement and that this Agreement will remain in effect until the Panel has completed its deliberations unless terminated in accordance with Paragraph 18.

2. Composition of the Panel - Additional Panels. The Panel shall consist of three members selected by the parties. The Corps and BRC shall select separately one member who shall be a technical expert knowledgeable in construction and engineering (the "Technical Members") and the parties jointly shall select the third member who shall be knowledgeable in construction and government procurement and who shall act as Chairman. No member of the Panel shall be an employee of any party (or of a subcontractor of BRC). The fees and expenses of each Technical Member shall be borne by the party selecting the Member and shall not be awarded as costs in this or in any subsequent proceeding; the fees and expenses of the Chairman as well as the administrative fees of the Panel shall be borne by the parties equally and shall not be awarded as costs in this or in any other subsequent proceeding. The composition of the Panel may be changed by mutual agreement of the parties. Additionally, if the parties





agree that additional Panels are appropriate, Panel Members will be selected in the same manner as provided herein.

3. Functions of the Panel. The Panel shall function as an independent, impartial review panel; and each of its members shall act independently and shall not be any party's representative. The Panel shall receive a presentation by each party respecting the Claims; consult with one another concerning their merits; render a prompt written report with a non-binding recommendation for the disposition of the Claims, and, when requested to do so by either party, on the quantum of recovery (if any) it recommends as appropriate. The non-binding recommendations of the Panel shall be made by majority vote although the actual vote of the Panel shall not be disclosed. No dissenting vote shall be recorded.

4. Ex Parte Communications Prohibited. Subsequent to the date on which proceedings are initiated before the Panel, no party shall engage in any ex parte communications with any member of the Panel. This does not apply to routine requests for fees and expenses to be borne by the parties as outlined in Paragraph 2. No written communication shall be made between the Panel and a party without the other party receiving a copy; and no such oral communication shall take place without the other party being present.

5. Representatives of the Parties. Each party will designate a representative to act on its behalf who has binding authority to enter settlement agreements (the "Principal Representative"); a representative to be responsible for the administration of this Agreement and for compliance with the procedures established by the Panel, including the exchange of written materials, the coordination and scheduling of the proceedings and the providing of appropriate notices (the "Administrative Representative"); and a representative to present the position of the party to the Panel (the "Hearing Representative"). The name(s) of the Hearing Representative(s) shall be



provided to the Administrative Representative at least two weeks before the hearing. The same person may be appointed to act as a representative in more than one capacity.

6. Scheduling of Proceedings. At convenient times, the Administrative Representatives shall agree upon and advise the Panel of the order for the presentation of the Claims and the amount of time that shall be allotted for the presentation of each. Schedules shall be prepared by the Administrative Representatives four weeks in advance of the hearing to allow the parties to prepare their presentations. Subject to the concurrence of the Chairman of the Panel, the parties intend to initiate proceedings before the Panel within 30 days after each party names its representatives at such times and location as is convenient to the Panel and the parties; provided, however, the initial sessions of the Panel shall be held at Ft. Drum.

7. Document Discovery. A party may request discovery on any Claim by document discovery; provided that such documents shall be requested at least four weeks and produced at least two weeks prior to the Panel hearing on the Claim to which they relate. Because of the nature and extent of the documents previously exchanged by the parties, it is anticipated that document production will be voluntary and limited in scope. Each party agrees to cooperate with the other to produce the information necessary to a full and fair presentation of the facts relevant to the Claims. The Administrative Representatives will agree to a discovery schedule, if necessary.

8. Preparation of Position Papers. No later than two weeks prior to the presentation of the Opening of a Claim, the claimant shall file with the Panel and serve on the other party its position paper setting forth: (a) a concise description of the Claim; (b) the bases on which it contends it is entitled to additional payment; (c) the amount of payment it seeks if a monetary award is requested; and (d) legible copies of all exhibits and substantiating materials on which it intends to rely. No later than one week thereafter, the other party shall file and serve its position paper setting forth its Answer





to the points made by the claimant and the documentary materials on which it intends to rely. The claimant may file and serve a written Reply to the Answer no later than 24 hours prior to the hearing on the Claim. Exclusive of exhibits, the position papers setting forth the Opening and Answer of the parties shall be of no more than 15 pages in length; the Reply, if any, shall be of no more than 5 pages in length. Each position paper shall be presented on 8 1/2 X 11 sized paper and double spaced.

9. Documents Provided Panel. Prior to the initiation of the proceedings, the Administrative Representative of each party will provide the Panel with copies of this Agreement and the Contract and access to all pertinent drawings and specifications regarding the Contract, and such additional documents as may be requested by the Panel.

10. Proceedings Before the Panel. All proceedings before the Panel shall be in accordance with such procedures as are consistent with the terms of this Agreement and as may be adopted by the Panel; provided that all proceedings before the Panel will be informal in nature; neither the federal rules of evidence nor of civil procedure will apply; neither party will have the right of cross examination, although either may submit written questions to the Chairman which the Chairman may ask in his discretion; no act or omission by either party will constitute a bar to pursuing relief before any other tribunal; no recommendation of the Panel will be binding upon either party, although any such recommendation will be admissible in evidence in any subsequent proceeding between the parties and each party hereby stipulates to its admissibility. To the extent practicable, the Claims will be presented on an expedited schedule. The presentation of the parties may be in any oral or written form that facilitates an understanding of the Claims, whether through direct testimony, expert witnesses, audio or visual aids or other form of demonstrative evidence. In order to expedite the proceedings, the parties will stipulate to all facts which are not genuinely in dispute.





11. Presentation of Claims. Unless otherwise agreed upon by the parties, the presentation of the Claims shall be made in four parts: the Opening by the claimant; the Answer by the other party; the Reply by the claimant and the Reply by the other party. An equal amount of time shall be allotted for the Opening and the Answer. The amount of time allotted for the Reply shall not exceed one-half the time allotted for the Opening. The scope of the Reply shall be restricted to new issues raised by the other party during its Answer or Reply. After the presentation by each party or at any time during the course of proceedings, the Panel shall have such period as it deems reasonably necessary for questions. At the conclusion of the question period, or at such later period as the Panel may decide, the Claim shall be submitted to the Panel for its recommendation.

12. No Transcripts. No transcript or recording shall be made of the Proceedings before the Panel.

13. Non-Binding Report. The Panel will render its written Report with respect to each Claim within seven working days from the date of its submission. The report shall include: (a) a concise summary of the Claim and of the material factual matters in dispute; (b) a statement of the recommendation of the Panel (including its resolution of the disputed facts); and (c) a brief discussion of the bases for the non-binding recommendation, including the quantum, if requested. Periodically, the Panel will be scheduled to convene in the presence of the Principal Representatives for the purpose of officially releasing Panel Reports and to allow the Principal Representatives to discuss the Reports with Panel Members, if necessary. The Principal Representatives will then attempt to negotiate settlement of the Claims. If after 10 working days, the Principal Representatives fail to reach a mutually acceptable settlement, the Contracting Officer will issue a Contracting Officer's Decision on an expedited basis and the parties may proceed in accordance with the provisions of the Contract Disputes Act. It is agreed and understood that the Government may accept a recommendation subject to the availability



of funds. In such case, the Government will make a good faith effort to obtain the necessary funds. It is further agreed that any proposed settlement by the Principal Representatives is subject to approval and documentation in accordance with the applicable regulations, including the Truth in Negotiations Act, as well as approval by BRC management.

14. Suspension of other Proceedings - No Waiver. All requests by BRC for Contracting Officer's Decisions which have not yet been issued are hereby suspended pending the conclusion of the proceedings before the Panel. If necessary, the parties will file a joint motion to suspend proceedings pending before any tribunal regarding BRC claims. Interest, if any, will accrue or continue to accrue in accordance with the Contract Disputes Act of 1978 on such claims in the same manner as though the proceedings or requests for decisions had not been suspended. Claims submitted by BRC in the future will be submitted subject to the terms of this clause.

15. Subsequent Proceedings - Admissible Evidence. No position papers or other written material supplied to the Panel in connection with these proceedings is admissible in a subsequent proceeding unless otherwise made so by the rules of evidence applicable to such other proceeding; provided, however, that any written report of the Panel shall be admissible in such subsequent proceedings and each party hereby stipulates to its admissibility; and provided, further, that if settlement is reached as a result of the recommendations of the Panel, any materials presented to the Panel (as well as its recommended decision) may be used to justify any contract modification which may result from the settlement.

16. Confidentiality of Deliberations - Disqualification. Panel deliberations shall be confidential and shall not be disclosed to third parties. Panel members are disqualified as a witness, consultant or expert for either party in this or any other dispute between the parties arising out of the performance of the Contract.



17. Delegation of Authority. Any designated representative of a party may delegate to a subordinate his authority to represent the party by giving notice to the other party, provided that the authority of the subordinate is co-extensive with that of the designated representative; provided, further, that no authority of a member of the Panel may be delegated without the written consent of the Corps and BRC.

18. Right to Terminate. The Corps and BRC each reserves the right to terminate this agreement at any time, with or without reason.

WHEREFORE, the Corps and BRC have executed this agreement the day and year first above written.

United States Army Corps of Engineers





APPENDIX 7

SOUTH ATLANTIC DIVISION,  
U.S. ARMY CORPS OF ENGINEERS,  
MEETING SUMMARY FOR  
ADR ROUNDTABLE,  
JUNE 8, 1989



Meeting Summary  
South Atlantic Division  
U.S. Army Corps of Engineers  
ADR Round Table

On June 8, 1989, the South Atlantic Division of the U.S. Army Corps of Engineers sponsored a Round Table meeting on Alternative Dispute Resolution (ADR) in Atlanta, Georgia. Participants at the Round Table session represented the Corps, major corporations who do contract work for the Corps, and law firms which serve as outside counsel for the contractors. The session was facilitated by Marguerite S. Millhauser, Esq., of Conflict Consulting, who presented an overview of ADR and guided group discussions. More than thirty participants took part in the meeting, including Corps Chief Counsel Lester Edelman, who summarized the Corps ADR program, and Judge Richard Solibakke, Chairman of the Engineer Board of Contract Appeals, who was a participant and the luncheon speaker. Also attending was Major General Robert M. Bunker, South Atlantic Division Engineer who was the host, and Stephen Lingenfelter, Division Counsel and organizer of the Round Table session.

There were two main purposes for the ADR Round Table. First was the desire to promote ADR by giving participants the opportunity to learn more about this developing field and the Corps of Engineers' program to promote ADR. Second, the Round Table offered the opportunity for a dialogue among those directly involved in business relationships which have become entangled in the modern-day web of litigation. In the spirit of cooperation which underlies successful ADR efforts, it was hoped that a genuine exchange of perceptions could occur, including obstacles to ADR and opportunities for promoting greater use of ADR procedures to resolve disputes.

In this spirit, what follows is a summary of the discussion comments of participants on obstacles to and opportunities for ADR, as well as specific suggestions for individual action to promote ADR. These are not detailed "minutes" nor are any comments attributed to any individual speaker. The purpose is to convey a sense of the discussion and memorialize some of the insights offered by participants. The ideas and perceptions are those of the individual participants presented, as they were solicited, without judgement or endorsement of any position. There was no attempt to reach a group consensus of Round Table participants - the goal was to acquaint participants with ADR procedures and promote a productive dialogue. It is hoped that this summary will spur further dialogue and increased cooperation among those involved.

Perceived Obstacles to Implementing ADR

Participants were asked to consider and list their perceptions of the major obstacles to greater use of ADR that exist today from their knowledge of the Corps, the contractor community, and outside law firms. The following is a summary of the written lists and a reflection of the discussion at the Round Table session.



- o Obstacle: Tradition/corporate culture favoring the usual way of doing business (including litigation) while avoiding ADR as an unknown.

This obstacle might also be called "institutional resistance to ADR." Participants felt that each of the groups represented (Corps, contractors and counsel) faced this obstacle in their organizations. Comments on the institutional resistance to ADR included:

- wariness of new roles and procedures
- 'turf' protection
- organizational inertia
- perceived threat to career if ADR fails
- reluctance to appear to oppose field staff by suggesting settlement.

The overall sense of the discussion was that organizations faced a mindset which preferred the known quantity of dispute resolution through litigation, rather than the unknown risks of ADR.

- o Obstacle: Lack of incentives to settle.

Related to the first obstacle, participants noted that the present dispute resolution system does not include any significant incentives for decisionmakers to settle disputes more efficiently. There seems to be no mandate or policy which favors settlement--it was even commented that "no one gets hurt by saying 'no' to ADR." Thus, the usual way of dispute resolution through the Contracts Disputes Act (CDA) becomes the 'safe' way, and there is no incentive to use ADR.

- o Obstacle: Professional vanity: unwillingness to appear to be mistaken in a professional opinion.

This obstacle is also related to the first two since corporate culture prizes and rewards professional acumen and provides no incentives to promote management decisions based on facts rather than assigning blame for errors. Professionals may feel that by recognizing that their opponent's case may have some merit, they admit that their own judgments were somehow wrong. Technically trained professionals may feel there is only one 'right' answer to a technical problem. Recognizing another interpretation is then a blow to their professional self esteem.

- o Obstacle: Lack of trust.

This obstacle was noted as a barrier to the problem-solving spirit that is needed for ADR procedures to be effective. Participants voiced a number of perceptions which show how willing we are to think the worst of the motives of those we disagree with:





- contractors are perceived as 'claims artists'
- contractor managers are rumored to receive a percentage of the claims they recover
- the Corps threatens contractors with protracted litigation
- outside counsel is only interested in amassing billable hours
- the system/bureaucracy is deliberately unresponsive
- contractors count on claims to make up for bidding errors

These perceptions, all indicating a basic lack of trust, can block an ADR effort before it can get started.

- o Obstacle: ADR as a signal of a "weak" case.

There was overall support for the perception that initiating discussion of ADR may be seen as the signal that one's own position is somehow weak, or not worthy of the full investment of time and energy needed to win a court judgment. No one at the Round Table session endorsed this view but many were concerned that this unintended message could have a negative effect on the chances of using ADR to resolve the dispute. Ironically, it was felt that the suggestion to attempt settlement through ADR might stiffen the resolve of the other side to carry on with litigation.

- o Obstacle: The need to justify the ADR settlement.

This obstacle applies to the government in its ability to enter settlement agreements. The government settlement must be supportable; must be documented; must comply with procedural requirements; and the settlements are subject to review by a number of audit and investigative agencies including the Office of the Inspector General. A financial justification is required which must show that the government's settlement decision was reasonable. A number of participants commented that the paperwork required to justify a settlement needed to be simplified to remove the disincentive to settlement.

- o Obstacle: ADR is counter to the financial interest of outside counsel.

Outside counsel were perceived to be reluctant to use ADR because a process which provides a more efficient resolution of disputes would not generate the same number of billable hours as litigation. Thus, there would be no financial incentive for outside counsel to be interested in ADR. (It should be noted that this perception was strongly contested by the outside counsel present.)

- o Obstacle: Outside counsel's fear of disappointing the client's desire for a strong advocate.

Participants commented that this obstacle may stem from the 'hired gun' attitude which stresses defeating the other side as the primary objective.



Reputations are made as tough litigators, not effective problem-solvers. For outside counsel to suggest ADR would seem to be a surrendering of the advocate's role. Clearly, this obstacle is linked to the perception that suggesting ADR indicates a weak case. A number of other factors were suggested by participants, however. Outside counsel may feel that they lose authority and control of a case when ADR is used. ADR may mean to some that the maximum recovery was not obtained. There may also be a problem in educating and convincing a client that ADR can be a beneficial option, especially when the client believes strongly in the case. Both the client and counsel may be unwilling or unable to perceive the merit of the other side's position.

o Other Obstacles:

Participants mentioned a number of other obstacles to increased use of ADR including:

- Uneasiness about the seeming lack of structure of ADR proceedings.
- Government auditors seem to control, dictate or determine the government's position on a claim -- they pose an obstacle to ADR.
- Lack of faith in the people involved--who will be the neutral advisor? Will we have the right decisionmaker involved?
- Is ADR a fair process?
- Current contract language does not expressly permit ADR procedures.
- Fear of the consequences of failure: cost, wasted effort, revealing your case to the other side.

Strategies to Overcome the Major Obstacles

Following the discussion of major obstacles to using ADR, Round Table participants were asked to suggest strategies to overcome these barriers. The discussion generated creative responses, many of which were complementary. The obstacles discussed will be restated below along with the suggested solutions.

o Obstacle: Tradition/corporate culture.

Suggested solutions:

- Training for greater familiarity with ADR.
- Promote a new problem-solving paradigm.
- Leadership.
- Success models of ADR use.



- Include mention of ADR options in contracts.
- Dispute resolution should be made part of the performance evaluation of Corps and contractor personnel.
- Establish a federal office to promote ADR.

o Obstacle: Lack of incentives to settle.

Suggested solutions:

- Push responsibility and authority for settlement down in the organization.
- Job descriptions should include effective dispute resolution.
- Compensation/bonuses based on ADR success.
- Efficiency ratings and evaluations could include dispute resolution measures.
- Promote the attitude that litigation is a failure.

o Obstacle: Professional vanity.

Suggested solutions:

- Reward settlements.
- Involve objective decisionmakers, not those too closely associated with the project.
- Minimize personal threats to people and reputations.
- Focus on results.

o Obstacle: Lack of Trust.

Suggested solutions:

- Cooperative training courses for Corps and contractors.
- Use more partnering and team building activities.
- Recognize and reward successful use of ADR.
- Share project information through regular communication sessions.
- Establish mutually acceptable audit procedures.
- Get participation and support from top management for ADR procedures.





- o Obstacle: ADR as the signal of a weak case.

Suggested solutions:

- Establish an organizational policy to use ADR.
- Establish a pattern of communication or joint meetings to discuss problems.
- The Corps should take the initiative as the "instigation office" for ADR.
- Boards of Contract Appeals should suggest ADR in the early proceedings.
- Include the ADR option in the contracting officers' decision.
- Establish a mechanism for earlier use of ADR.
- Set up a joint investigative process to pursue settlement.
- Involve senior management in a dispute automatically after a given time period or event.
- Establish the position of ADR advocate.

- o Obstacle: The need to justify the ADR settlement.

Suggested solutions:

- Change the regulations and procedures for justification.
- Contracting officer's signature should be sufficient for settlement without the need for justification.
- Give more authority to managers for settlement decisions.
- Education about and clarification of the justification procedures.

- o Obstacle: ADR is counter to the financial interest of outside counsel.

Suggested solutions:

- Emphasize better client direction and counseling through knowledge of ADR.
- Use value-base fee contracts rather than hourly fees.
- Increase awareness that ADR can be profitable.
- Emphasize problem-solving capabilities.



- o Obstacle: Outside counsel's need to be a strong advocate.

Suggested solutions:

- Better communication between client and counsel.
- Bring counsel in on a dispute earlier.
- Early assessment of the legal budget will make clients more favorable to ADR.
- Train inside and outside counsel together in ADR.

What can be learned from the listing of obstacles to ADR and proposed solutions? Some conclusions can be grouped around major points of emphasis found in the responses. A review shows several themes:

- Awareness

Training in ADR was frequently mentioned as a way to overcome barriers. Familiarity with the goals and procedures of any new initiative will increase acceptance and use of the new method. A primary way to address institutional resistance to ADR is through educating people in ADR. Significantly, several Round Table participants mentioned cooperative training in ADR. The idea of fostering a cooperative, problem-solving spirit by involving Corps and contractor personnel and outside counsel in joint training programs was an innovative suggestion.

- Incentives

Many participants mentioned ways that dispute resolution incentives could be built into an organizational system. Participants recommended effective dispute resolution as part of the evaluation of management performance and compensation, and increased recognition for successfully resolving disputes. Dispute resolution could also be included in job descriptions. These suggestions would provide personal and organizational incentives to try ADR and raise the visibility and acceptance of dispute resolution.

- Communication

Another emphasis in many responses was on the benefits of open communication among those involved in business relationships. Communication before disputes arise helps head off problems and dispel bad feelings and false perceptions. After a dispute arises, communication is the basis for collaborative problem-solving. Participants recommended regularly scheduled communication sessions in the course of project performance.

- Early action

Participants agreed that dispute resolution was most effective when used early in the development of a conflict. If problems become 'institutionalized' it is more difficult to resolve them. If alternative ways



of resolving disputes are to be most effective, they should be used early enough to avoid the expense of litigation.

### ADR Benefits and Opportunities

Round Table participants were asked to consider and list some benefits of and opportunities for ADR from the point of view of each of the three groups represented, the Corps, contractors and law firms. The purpose of the exercise was to brainstorm ideas and new viewpoints which might be used to overcome obstacles, or as new initiatives, to increase the use of ADR. Too often, we concentrate on the negatives of a situation rather than thinking about the positive benefits and opportunities that are presented by a new course of action. The following suggests many positive aspects and opportunities for promoting ADR.

#### Benefits

Those who listed benefits of ADR for the Corps and contractors stressed the ability to realize important gains by closing out projects rather than having them continue as unresolved claims. The Corps is able to clear its backlog of projects and can devote resources to new work. Contractors get paid more quickly without waiting for lengthy claims procedures, and good working relations with the Corps are preserved.

There was a greater variety of potential benefits of ADR listed for outside counsel. Participants mentioned improved client relations and satisfaction with legal services which would result from more efficient and effective dispute resolution. Law firms would also benefit by building expertise in a new field that seems to be gaining momentum. It was also suggested that ADR might help avoid the 'boom-or-bust' syndrome of a litigation practice, where law firms are either swamped with trial activities or looking for ways to fill in the gaps between trial preparation periods. ADR could even out the work load and improve a law firm's reputation for problem solving.

#### Opportunities

Those who listed opportunities to increase the use of ADR mentioned many specific suggestions which can be discussed in four topics.

- Education about ADR.

All aspects of making more people aware of ADR were mentioned by participants. Training courses, including joint training efforts, were mentioned as ways to begin to change the mindset on dispute resolution for the Corps and contractors. For law firms, education in ADR was seen as an opportunity to provide a valuable service to clients and another option for achieving the client's goals.

- Change existing regulations or policies.





The Corps is effected most obviously by this category of suggested opportunities. Participants noted the opportunity to simplify the paperwork required to resolve disputes, especially the requirements for justifying the settlement of a claim. It was also suggested that regulations could be changed to provide more incentive for ADR. Clear policy direction can promote ADR.

Corporate policies on dispute resolution were also mentioned as opportunities to promote ADR use. A clear policy favoring early dispute resolution can eliminate the perception that willingness to propose settlement means that the claim is weak. A clear statement of policy can also go a long way toward changing the organizational mindset toward collaborative problem solving.

- Change the decision making level for ADR.

A number of participants noted the opportunity for the Corps and contractors to change decisionmaking authority for using ADR. There seems to be two complimentary ideas at work. First, some said that an opportunity to promote ADR could be realized if those higher in the organization (for the Corps, a level above the contracting officer) were responsible for deciding to use ADR in a particular case. This would allow a decisionmaker who is not personally invested in the dispute to decide whether ADR should be used. Similarly, a contractor's project managers might not be as favorably disposed to settlement of a particular dispute as would an uninvolved executive. On the other hand, some participants felt that the opportunities of early resolution of disputes could best be realized by pushing authority down in the hierarchy. These two seemingly divergent suggestions may be complimentary if the emphasis is placed on the time in the development of a dispute when there should be a new view. Early resolution of disputes requires authority at the project level for settlement. If a dispute has escalated and has involved personalities, data conflicts, motions, or other barriers that are blocking resolution of the dispute, there may well be some benefit in another view of the potential for ADR. Striking the right balance between these two views will be important in promoting effective use of ADR.

There was another suggestion that deserves mention here. One participant felt that the Boards of Contract Appeals might be allowed to initiate ADR once an appeal of a contracting officer's decision had been filed. There have been experiments in some federal District Courts with such techniques as summary jury trials as a possible model should such a suggestion be adopted.

- Early evaluation of disputes.

As noted above, early resolution of disputes is most desirable. Working relations are preserved and the greatest savings in resources and time are realized. It was suggested that some form of early dispute evaluation could be used by the Corps and contractors to promote an examination of the potential for ADR.



### Suggestions for Action

As a trial exercise, Round Table participants were asked to consider specific ways that they could promote ADR in their work. Each person told the group his or her suggestion for personal action:

- Establish internal training programs in ADR;
- Set a personal goal of trying an ADR procedure;
- Institute ADR training at the project level;
- Establish a corporate policy favoring ADR;
- Spread the word about the availability of alternative procedures to management, colleagues and outside counsel;
- Make ADR availability known through contract documents or clauses, and at professional conferences;
- Increase personal awareness of ADR opportunities;
- Inform staff of the ADR Round Table and its message;
- Work to change the mindset that currently favors the litigation track as the only dispute resolution option;
- Review existing cases for ADR potential;
- Promote a corporate policy favoring ADR to counter any perceived weakness associated with suggesting settlement;
- Open issues up to resolution at lower organizational levels;
- Raise the ADR option at early stages of disputes;
- Send a clear message to outside counsel favoring the ADR option;
- Include negotiation and ADR training as part of the training for Contracting Officers;
- Seek methods to create clear institutional support for staff use of ADR;
- Work to share ADR training among government and private contractors;
- Spread the word that the Corps is serious about ADR, and will make it available for smaller contractors also;
- Address business groups on the availability and variety of ADR procedures;





- Promote ADR education of all parties (Corps, contractor and counsel);
- Institutionalize ADR as part of the normal way of doing business;
- Explore the possibility of an organizational ADR advocate.

The breadth, and variety and innovation shown in these concrete suggestions for action is remarkable. Some are directed to solving a particular problem or overcoming a barrier to ADR, while others take an over-arching view of the subject, and still others make suggestions for action in terms of their personal attitudes to ADR. Those who are interested in promoting more efficient and effective resolution of disputes can draw many important suggestions from this list.

Overall, the Round Table session produced a spirit of movement toward common goals that was heartening. The Corps of Engineers ADR initiative was furthered by the Round Table. The Corps pledges its continued efforts to promote efficient and effective resolution of disputes where possible.

### Conclusion

The idea for the ADR Round Table was a product of the Corps Executive Seminar in ADR Procedures, held in Atlanta in February 1989. SAD Counsel Steve Lingenfelter and Marguerite Millhauser, who was a luncheon speaker at the session, talked about convening such a group. Steve then took the initiative, with the support of the Division Engineer, MG Robert Bunker, Corps Chief Counsel Lester Edelman and the Corps Institute for Water Resources. As with so much of the large Corps ADR program, the ADR Round Table was a new learning experience and the first time such a session had been convened. Though the Round Table was not planned as a prototype or the first in a series of such meetings, its success suggests that these kinds of meetings may provide an unusual opportunity for promoting ADR. Meeting in a common forum and allowing ample time for discussion among the participants seemed to create the cooperative spirit which will lead to greater use of ADR in the future. the SAD ADR Round Table may well provide a model for other regional or national meetings between Corps personnel, contractors and the outside bar.

The outcome of the Round Table session gives a good indication that a step has been taken toward greater use of ADR. Obstacles and problems were discussed in a cooperative way and mutual difficulties were shared. The suggestions for overcoming obstacles and the action lists show similarities. The list of opportunities gave participants a chance to express ideas for new initiatives and the action list gave participants a chance to commit themselves to personal action.





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APPENDIX 8

INTERVIEW RECORD SHEETS



## RESEARCH PAPER INTERVIEW SHEET

INTERVIEWEE: Lt. Alan M. Terpolilli, CEC, USN

ORGANIZATION: NAVY PEP, COE, FT. DRUM, N.Y. TELEPHONE NUMBER: AV 341-4101

INTERVIEW DATE: 18 April 1990

INTERVIEW TIME: 1530

### I. INITIAL QUESTIONS/RESPONSES:

1. How many claims/disputes have you seen resolved using U.S. Army Corps of Engineers ADR Procedures?

None. Lt. Terpolilli is currently working with the COE on a series of claims from Morris & Knudsen involving a \$517 million project at Fort Drum, New York.

2. How many claims/disputes were not able to be resolved using ADR?

The claim he is working on has 93 issues, 92 of which are going to arbitration. The other issue is over faulty design and is for \$113 million and is a summation of the other 92 issues.

3. What is the approximate dollar value of those claims/disputes:

92 issues of varying values from \$100,000 to \$3 - \$4 million. Total dollar value of the claim going to arbitration is approximately \$40 million.

4. What is your estimate of the dollars and time saved using ADR procedures:

That is unknown at this time since the arbitration has not started yet. The biggest savings will probably come in the time value of money, interest payments on the final settlement and the administrative costs of managing the claim for 4 - 5 years if it went to ASBCA.

5. How much experience do you have using the conventional DOD method of resolving disputes, especially using the ASBCA?

None. As a ROICC at previous commands I was always able to sell my change orders and resolve any disputes that may have arisen without having to resort to the claims process.

6. Would you please evaluate your experience with ADR when compared to the conventional DOD method.

ADR procedures do not save you any work when compared to conventional procedures. You do the same work preparing a case for arbitration as the EFD, NAVFAC and OGC do in preparing a case to go before ASBCA. The process of arbitration does not supersede the conventional claims process; rather, it augments it. You must do the same leg work with either process. It serves to weigh the merits of each position on the issues and serves as a basis to





reopen negotiations. If further negotiations fail, a final decision will be issued and the claims process will take over. But the number of issues that will go to the claims process should be reduced.

7. Could you send me some info on the cases that you have seen resolved using ADR, i.e., Contractor's initial position, Government's initial position, the ADR procedure used, the final agreement that was reached, and the time frame it took to reach agreement.

He will send me a copy of the arbitration agreement. I need to call him the second week in May to see how the process is working and get his opinions of the process by then.



#### ADDITIONAL COMMENTS:

1. The Arbitration Process: Each side selects a arbiter then these two select a third that is mutually acceptable. This has been the first real stumbling block - finding a mutually acceptable third. Both sides finally agreed upon a person from academia at George Washington University.

Each judge is being paid \$1000/day, receives free lodging, a rental car and is flown home each weekend. These costs are shared by the two sides.

Since the panel does not consist of government personnel authorized to commit Government funds, the panel will rule on the merits of each side's position on each issue. The panel's findings will then be used as the basis to re-open negotiations on that issues. If a resolution still cannot be reached, the C.O. will probably issue a unilateral change order in the amount last tabled by the Government. If the Contractor still finds that unacceptable he can still pursue the case through the conventional calms process to ASBCA.

2. The Case Preparation: The arbitration process requires a tremendous amount of leg work on the part of the field office preparing the case and doing mock-trials. But this work is the same sort of work that the EFD, NAVFAC and OGC does in preparing a case for ASBCA. In the long run, if a case ultimately goes to ASBCA this background work will have helped the government in preparing a better case. The people that made the decisions in the field have already had a chance to make sure their ducks are in a row while the situation is still fairly fresh in their minds. Then when the lawyers from headquarters or the OGC come into the case the background material is fairly complete.



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RESEARCH PAPER INTERVIEW SHEET

INTERVIEWEE: Larry Millhouse (Code 0223) ORGANIZATION: SOUTHDIV

TELEPHONE NUMBER: AV 563-0903

INTERVIEW DATE: 4/19/90

INTERVIEW TIME: 1500

I. INITIAL QUESTIONS/RESPONSES:

1. How many claims did SOUTHDIV process last year?

92, 4 were subsequently withdrawn by the contractor during review.

2. Of those, how many were:

a. Referred back to the field activity to be negotiated: 17

b. Negotiated by SOUTHDIV: 0

c. Issued an C.O.'s Final Decision: 70

d. Were forwarded to NAVFAC/ASBCA: 1 (None to ASBCA)

3. Of the ones that had a final decision issued or went to NAVFAC/ASBCA, how many were found in the favor of the Contractor?

0

4. Are you familiar with the ADR (arbitration/mediation) procedures currently being used by private industry in lieu of litigation?

Yes

5. Of the disputes/claims your office handled last year how many do you feel could have been resolved if a truly neutral third party had been available to assist the field office and the Contractor reach an agreement.

About 20

6. How many man-hours do you estimate are expended each year in handling claims both at the EFD level and the Field Activity level.

Approximately 32,000 work hours



## ADDITIONAL COMMENTS:

### 1. Comments from Apr 18 Interview:

a. One of Larry's concerns and one he has heard voiced elsewhere is that any ADR process will eventually become a substitute for the current process, circumventing the current procedures. In other words we may be creating a second claims process.

- I pointed out the ADR can be set up so that both sides must agree to the process. If the Government feels ADR procedures would serve no useful purpose then it could simply refuse to arbitrate or call in a mediator.

b. Contractors will not be interested in ADR procedures since there are no written procedures for the process as there are for the conventional claims process.

- ADR is currently being widely used in private industry. Most contractors (or their lawyers) should be familiar with the ADR process currently being used in industry. If the NAVY (or DOD) sets up its procedures similar to the procedures currently used in industry this should not pose a problem.

c. EFD Contract Review Board and the Chief's Board already exist as an alternative to the claims process

- These boards consist of Government personnel only. Even though they may not be involved in the dispute personally, they are still members of the government and will still hold some bias - either for the government or, in the interest of fairness, for the contractor. True mediation or arbitration panels should be totally neutral to ensure both sides get a fair hearing.

### Responses to the 19 April 1990 questionnaire:

- Claims/Disputes involving disagreement over the amount of compensation owed the contractor would be ripe for settlement by ADR procedures. But most of our claims involve : 1) differences of opinion on interpretations of the contract where the Government believes the contractor is not entitled to additional compensation, regardless of the amount; or 2) economic loss to the contractor that becomes evident to the contractor at the end of the job, where the contractor wants to recoup say \$100,000 and looks for justification somewhere in the history of the work. Neither of the above seem to lend themselves to ADR.

I believe that ADR is most useful in:

- 1) Contemporaneous resolution of isolated, single issue disputes where
- 2) the parties agree that the contractor has some amount of entitlement.



## RESEARCH PAPER INTERVIEW SHEET

INTERVIEWEE: Mr. Gary Garrison      ORGANIZATION: NAVFAC, Code 0211

TELEPHONE NUMBER: (202) 325-9121

INTERVIEW DATE: 25 Apr, 4 May, 11 May

### I. INITIAL QUESTIONS/RESPONSES:

1. How many claims did NAVFAC take to the Armed Forces Board of Contract Appeals last year?

Mr. Garrison will send me a copy of a briefing he just did for RADM Bottonff (Commander, NAVFAC) on the claims process in 1989.

2. Of these, how many were found in the favor of the Contractor?

See the briefing

3. What was the dollar amount that was paid out on these claims?

See the briefing

4. What percentage of this dollar amount was interest paid on the claims?

See the briefing

5. What was the average time it took for a claim to go through the process, reach ASBCA, and a final resolution be reached with the contractor?

Typically it will take two to four years, A complex claim may take as much as five years.

6. Who bears the Contractor's legal costs if the claim is found in his favor?

The Contractor

7. I understand OGC represents the Navy at ASBCA, does the Navy reimburse OGC for its services; if so, how much did the Navy reimburse OGC last year?

Generally NAVFAV is represented by EFD or NAVFAC counsel at ASBCA. If OGC or the Department of Justice represent NAVFAC, we reimburse them.

8. Are you familiar with the ADR (arbitration/mediation) procedures currently being used in private industry?

Yes we are. In fact we have tried to use ADR on some of our claims but have not had much success getting contractors to agree to participate in ADR.





9. Has NAVFAC done any research or had any experience with ADR?

Yes we have. Mr. Garrison will send me copies of the memo's outlining the Navy's ADR program. The briefing also includes data on ADR experience within NAVFAC. Finally Mr. Garrison will send me a copy of an article written by a NAVFAC counsel on NAVFAC's ADR performance.

10. Are you familiar with the work the U.S. Army Corps of Engineers has done with the use of Mini-trials?

Yes they are but only from a few briefings they have had. NAVFAC would be interested in any further info I can gather.

11. In your opinion, how many of the claims that NAVFAC sent to the Board last year could have been resolved if a truly neutral third party or parties had been available to help both the Contractor and the field office reach an agreement?

As the briefing shows, NAVFAC proposed ADR on 121 cases in 1989 but only had 4 where the Contractor agreed to the process. Mr. Garrison feels this is because ADR is relatively new and the contractors are reluctant to try a new process, even with the problems of the current claims process.

12. What is NAVFAC's opinion of using ADR? Why?

NAVFAC is committed to making ADR work. Mr. Garrison would like to see a copy of my research topic once its finished to see if there is something NAVFAC can do better to get ADR going.



#### FOLLOW-UP QUESTIONS:

4 May: The Navy looks at ADR in the strict sense of an alternative to litigation. Therefore ADR is proposed only after a Contracting Officer's Final Decision. I pointed out that ADR will also work before a Final Decision as a type of claims avoidance. I felt the Navy was missing an opportunity of avoiding litigation by waiting until after a Final Decision.

Gary also suggested I talk to WESTDIV (Mr. Tom Sabadini) about their DRB which appears to be a form of ADR that WESTDIV is suing before Final Decision with a good deal of success.

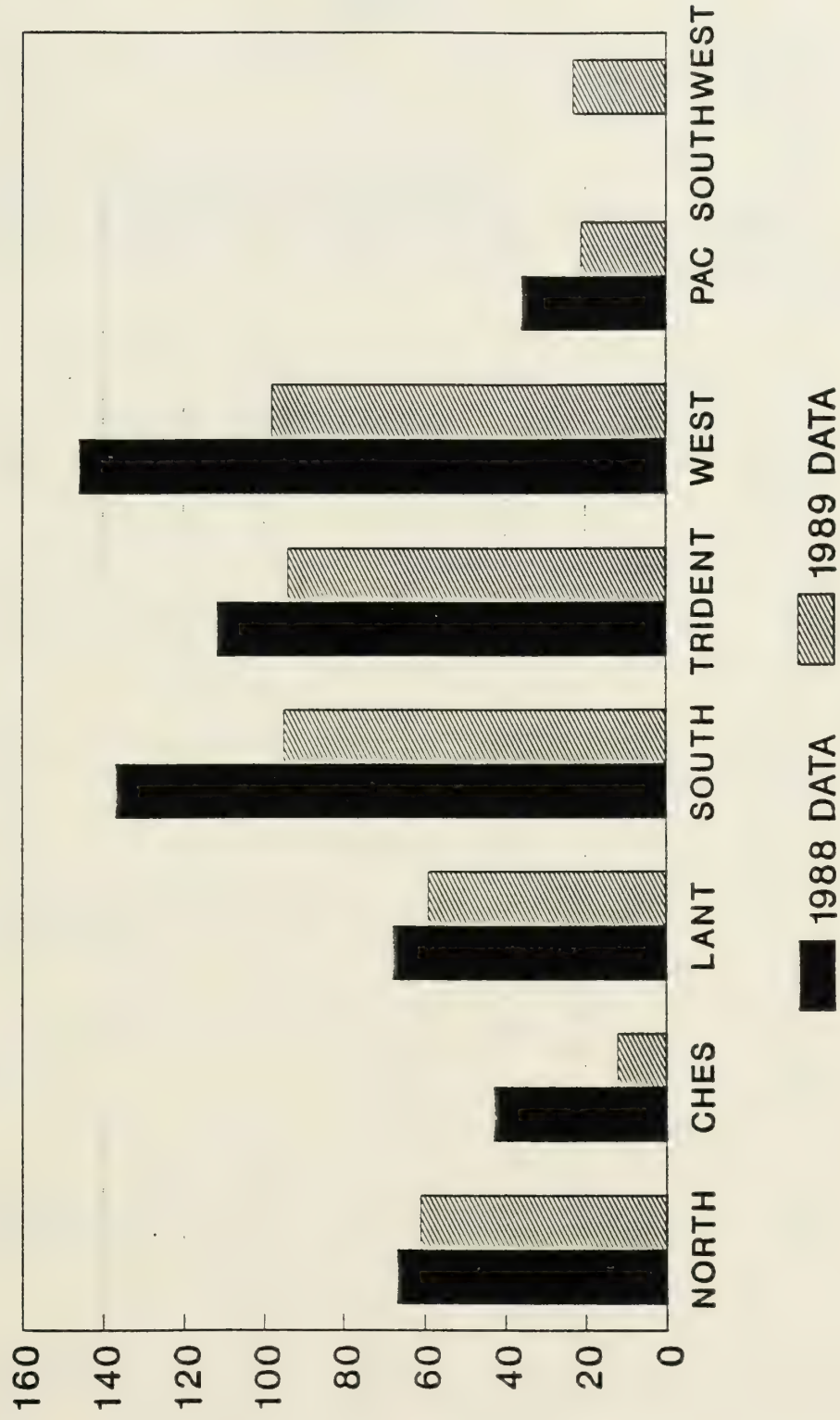
Gary pointed out that NAVFAC is trying to tailor its ADR program toward the low end of the claims spectrum since most of its claims were below \$100,000. He was not sure what the Corps of Engineers was doing would be applicable to NAVFAC since most of the Corps ADR dealings have been for amounts in excess of \$1 million.

Mr. Garrison will also send me a copy of a point paper and letter that RADM Montoya sent to the president of the AGC to solicit the AGC's assistance in getting contractors to participate in ADR.

11 May: According to Mr. Garrison, NAVFAC has no experience with Mini-Trials.



# BREAKDOWN OF ACTIVE APPEALS (BY EFD)







# NAVFAC APPEALS AT THE ASBCA

## 1989

NUMBER OF NAVFAC APPEALS  
AND THEIR DOLLAR AMOUNTS

463  
\$ 96,374,494

NUMBER OF NEW APPEALS  
DOCKETED IN 1989

222

NUMBER OF APPEALS:

DENIED

54

SUSTAINED

11

SPLIT

9

DISMISSED

100

SETTLED

81



# 1989 ASBCA APPEALS AND ADR DATA

NAVFAC APPEALS UNDER \$25K	255
NAVFAC APPEALS BETWEEN	59
\$25K AND \$50K	
TOTAL	314
NUMBER OFFERED	121
NUMBER ACCEPTED	4
VALUE OF CLAIMS	\$ 47,158
ENTITLEMENT FOUND	\$ 13,167



# NAVFAC CLAIMS WORKLOAD

1988 AND 1989

EFD	NO. OF CLAIMS RECEIVED		NO. RETURNED FOR NEGOTIATION		\$ VALUE OF CLAIMS REMANDED	
	88	89	88	89	88	89
SOUTH	160	85	30	15	\$ 2,874,098	\$ 1,918,522
LANT	149	140	30	31	1,676,604	1,904,280
WEST	325	219	25	23	1,553,395	1,203,654
CHES	123	74	15	11	214,418	396,010
NORTH	98	92	78	35	1,672,595	893,778
PAC	44	30	11	1	12,823,989	10,354
TRIDENT	52	19	2	1	186,864	32,616
NAVFACCO	2	1	0	0	0	0
STHWEST	50	21	0	0	0	0





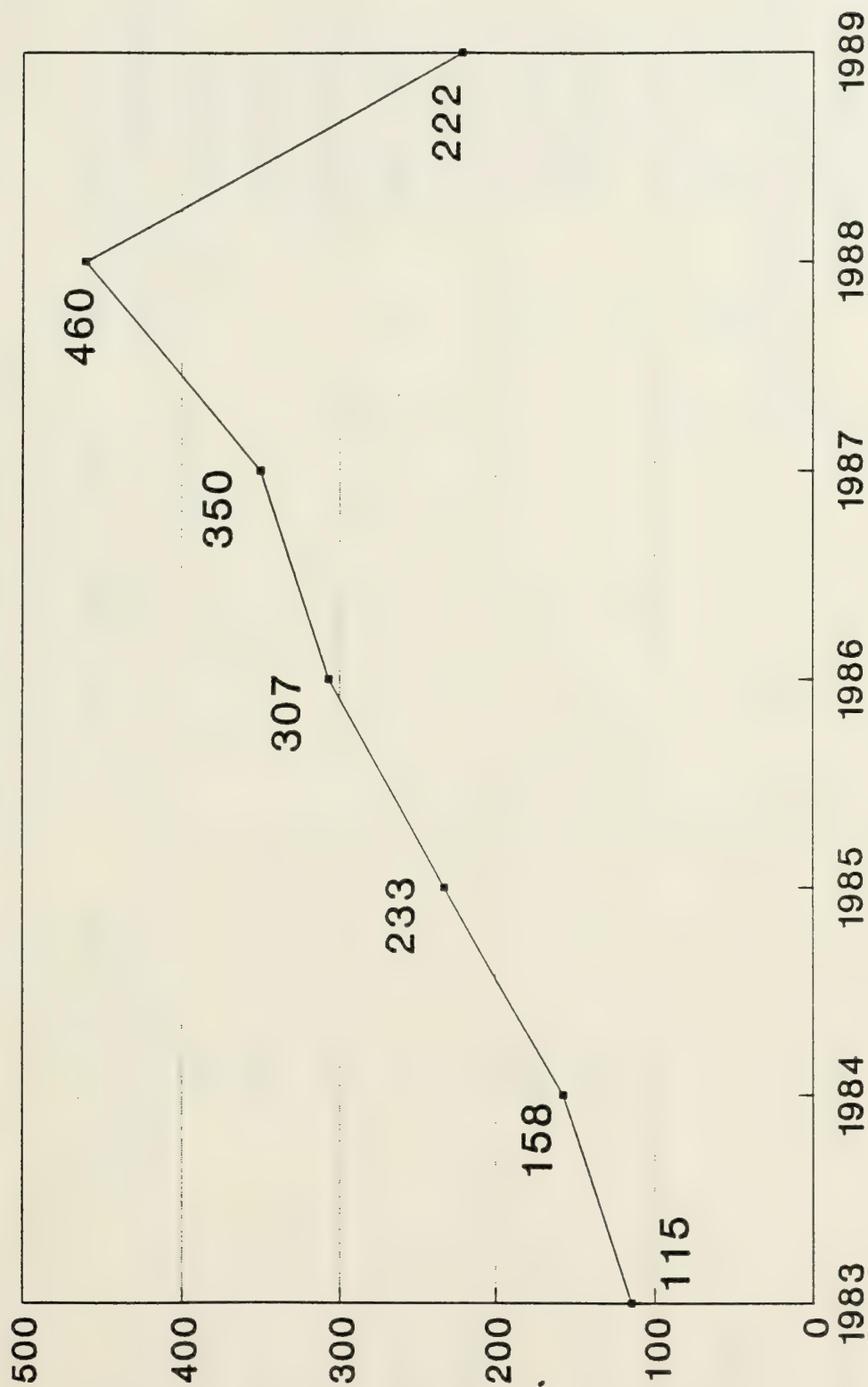
PERCENTAGE OF NAVFAC CLAIMS  
REMANDED FOR NEGOTIATION

1988 AND 1989

EFD	1988	1989
SOUTH	19%	18%
LANT	21%	22%
WEST	8%	11%
CHES	12%	15%
NORTH	80%	37%
PAC	25%	3%
TRIDENT	3%	5%
NAVFACCO	0%	0%
SOUTHWEST	0%	0%



# NAVFAC APPEALS FILED BY YEAR AT THE ASBCA





# CLAIMS WORKLOAD

1989

EFD	NO. OF CLAIMS RECEIVED	NO. RETURNED FOR NEGOTIATION	\$ VALUE OF CLAIMS REMANDED
SOUTH	85	15	\$ 1,918,522
LANT	140	31	1,904,280
WEST	219	23	1,203,654
CHES	74	11	396,010
NORTH	92	35	893,778
PAC	30	1	10,354
TRIDENT	19	1	32,516
NAVFACCO	1	0	0
STHWEST	21	0	0
TOTAL	681	117	6,359,114





NAVAL FACILITIES ENGINEERING COMMAND

WESTERN DIVISION

DISPUTES RESOLUTION BOARD

1989

Total Number of Claims addressed by the DRB: 96

Total Value: \$28,087,467

\* Negotiated by the DRB: 41

Negotiated amount: \$9,944,588

\* Resolved by Final Decision: 27

Dollars awarded by decision: \$0

Value of claims denied: \$2,482,666

Appealed: 5

\* Returned to ROICC for Negotiation: 21

Value of claims: \$1,542,277

\* Claims withdrawn by contractor: 5

Value: \$99,368

\* Continued: 2



NAVAL FACILITIES ENGINEERING COMMAND  
Contracting Officer Final Decisions  
(Money Claims Only)

	<u>1987</u>		<u>1988</u>		<u>1989</u>	
	Number	Value	Number	Value	Number	Value
LANT	67	\$1,905,000	75	\$3,410,000	78	\$6,094,000
NORTH	24	\$979,000	63	\$2,698,000	50	\$2,774,000
PAC	3	\$97,000	19	\$1,855,000	10	\$356,000
CHES	58	\$1,030,000	54	\$2,189,000	25	\$1,126,000
WEST	95	\$3,807,000	107	\$5,749,000	95	\$6,551,000
SOWEST		.....	30	\$1,588,000	21	\$2,928,000
SOUTH	113	\$1,341,000	112	\$6,073,000	52	\$1,886,000
OICC						
TRIDENT	32	\$5,761,000	47	\$3,325,000	26	\$11,716,000
PORT						
HUENEME		.....	..	.....	1	\$6,000
HQ	33	\$26,692,000	39	\$28,297,000	16	\$13,713,000
	425	\$41,612,000	546	\$55,184,000	374	\$47,140,000



NAVAL FACILITIES ENGINEERING COMMAND  
CONTRACTING OFFICER FINAL DECISIONS AND ASBCA APPEALS  
1970-1989

Year	Total Number	ASBCA Appeals
1970	44	...
1971	57	...
1972	74	8
1973	77	25
1974	123	56
1975	130	57
1976	127	100
1977	197	101
1978	198	97
1979	216	111
1980	207	88
1981	219	87
1982	244	84
1983 (a)	290	114
1984 (b)	320	157
1985	322	232
1986 (c)	577	393
1987	582	338
1988 (d)	688	433
1989	512	267

- (a) EFDs delegated FD authority for claims under \$50,000.
- (b) EFDs delegated authority to T4D a contract of any value for "abandonment".
- (c) EFD FD authority for claims increased to \$250,000 and authority delegated to T4D for any cause on a contract whose value does not exceed \$50,000.
- (d) EFD FD authority for claims and T4D "for cause" increased to \$500,000.





NAVAL FACILITIES ENGINEERING COMMAND  
CONTRACTING OFFICER  
FINAL DECISIONS 1970-1989

Year	Total Number	Claims for Time/Money		T4D		Default- Completion		ASBCA Appeals
		HQ	EFD	HQ	EFD	HQ	EFD	
1970	44	42		2				...
1971	57	54		3				...
1972	74	57		17				8
1973	77	58		19				25
1974	123	96		27				56
1975	130	97		33				57
1976	127	106		21				100
1977	197	145		52				101
1978	198	158		40				97
1979	216	184		32				111
1980	207	117		55		35		88
1981	219	136		61		22		87
1982	244	118		102		24		84
1983 (a)	290	136	55	82		17		114
1984 (b)	320	67	127	71	37	18		157
1985	322	54	159	46	39	24		232
1986 (c)	577	30	380	35	116	10	6	393
1987	582	33	392	30	121	1	5	338
1988 (d)	688	39	507	13	107	3	19	433
1989	512	16	358	3	124	0	11	267

- (a) EFDs delegated FD authority for claims under \$50,000.
- (b) EFDs delegated authority to T4D a contract of any value for "abandonment".
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- (d) EFD FD authority for claims and T4D "for cause" increased to \$500,000.



## 1989 LITIGATION REPORT

06

D	NO. OF APPEALS AND \$ AMOUNT	APPEALS DOCKETED AT ASBCA	APPEALS DOCKETED AT CLAIMS CT	APPEALS				
				denied	sustained	split	dismissed	set
	95 \$ 11,015,051	30	5	9	2	3	23	17
vd	23 \$ 5,919,980	9	1	3	0	0	0	4
or	61 \$ 12,358,952	29	1	9	3	2	4	9
ac	21 \$ 4,356,183	14	0	4	0	0	7	6
st	98 \$ 9,875,713	80	9	20	4	4	34	14
hs	12 \$ 841,073	6	1	4	0	0	8	10
ri	94 \$ 38,871,725	26	0	X	X	X	X	X
nt	59 \$ 13,135,817	29	0	5	2	0	22	21
	463 \$ 96,374,494	222	16	54	11	9	100	81



# CLAIMS OVER \$500K

1989

Month	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
Dollar Amt of Claims in Millions	67	59	52	51	47	59	30	43	50	68	57	66
Total No. of Pending Claims	41	40	38	44	38	29	23	23	23	32	25	29
No. of EFD Claims at HQ	18	19	18	14	10	9	7	7	6	8	4	5
No. of Claims at the EFDs	23	21	20	30	28	20	16	16	17	24	21	24





## RESEARCH PAPER INTERVIEW SHEET

INTERVIEWEE: STEPHEN I. LINGENFELTER      ORGANIZATION: SOUTH ATLANTIC  
DIVISION, COE

TITLE: DIVISION COUNSEL      TELEPHONE: 331-6754

INTERVIEW DATE: 2 MAY 1990      INTERVIEW TIME: 1400

### 1. WHAT HAS BEEN THE COE'S EXPERIENCE WITH ADR?

Generally very good. Every instance in which the Corps has used it the results have been beneficial to all the parties involved. We have experienced some resistance to its use, mainly because contractors are not familiar with the process; they felt that agreeing to ADR was some sign of weakness in their case. This is not so. Lawyers look at ADR as simply another method of reaching a resolution. Court is a crap shoot. At least with ADR you can select your third party and participate in reaching a resolution. To try and improve the response to ADR we held a round table discussion with a number of our contractors and their counsels. I will give you a copy of the lessons learned from that meeting.

### 2. When during the disputes process does the COE propose the use of ADR?

Historically it has been after a Contracting Officer's Final Decision. The main reason is because the process is fairly new. It can work both before and after a CO's decision but if done before it can serve to prevent claims and resolve disputes earlier.

### 3. Has the COE used other forms of ADR other than Mini-trials and Non-binding Arbitration?

Yes. The Corps has used a procedure similar to the Washington State Procedure. Our Mobile office has done the most with this. Every time it has been used it has been a success.

### 4. Has ADR reduced the number of claims to ASBCA?

Mr Lingenfelter has not seen any real reduction. But the process is still fairly new. In the long term it should serve to reduce the number of claims that reach ASBCA.

### 5. The Navy's policy on ADR suggests using ASBCA judges as the third party neutral in mini-trials - what is your opinion?

This may not be a good idea. A hearing observer from ASBCA is used to being in charge in a court. In a mini-trial you do not want the third neutral to run the show. The third neutral is there to facilitate and help the principals to reach a resolution. If the neutral takes over this may not happen - it will turn into a mini-court. This will not help in reaching a settlement.



## 6. Other Comments:

One area of resistance from the district offices has been that the cost of the arbiters or mediators has to come out of their operating funds. They are evaluated on the expenditure of their operating funds. If a case goes to ASBCA and the case is found against the Government the contract is increased in price to cover the cost of the claim. The office gets additional operating funds based on this contract price increase. So there is no incentive for the district office to expend its own funds to resolve the problem early.

We have never used mediators. The main reason is that it has never been tried. We have always favored the mini-trial, the review panel (Washington State Procedure), or non-binding arbitration. We realize mediation is part of the Arbitration process and eventually we will probably use it.

ADR will not replace the claims process. It is really just another arrow in your quiver in resolving contract disputes. It should be viewed as such.



## RESEARCH PAPER INTERVIEW SHEET

INTERVIEWEE: Tom Sabadini

ORGANIZATION: WESTDIV, San  
Bruno, Ca.

CODE: Q2C

TELEPHONE NUMBER: 415-742-7800

INTERVIEW DATE: 7 May 1990      INTERVIEW TIME: 1730 EST

### 1. WHAT IS THE DISPUTES REVIEW BOARD AS USED IN WESTDIV?

The Disputes Review Board (DRB) is a panel of three government personnel from WESTDIV that hear claims from the contractors. The board consists of a representative from the Contracts Division (Code Q2), the Construction Division (Code Q5), and the Office of the Counsel (Code Q9C). There are very few rules and is intended to remain flexible. The main rule is there can be no attorneys from either side during the presentations.

### 2. WHAT ARE THE PROCEDURES FOR THE BOARD TO HEAR A CLAIM?

Before the board goes to the site it reviews the paperwork on the claim from both sides so it is familiar with the case. Each side (the contractor and the ROICC) make a presentation of their case while the other side remains quiet and must listen. The Board will have a list of questions to ask if the presentation does not answer all their questions. Based on the presentation and the answers it receives, the board will either deny the claim, order the ROICC to re-enter negotiations with additional guidance, or issue a final decision.

Mr. Sabadini said he would send me a copy of the WESTDIV instructions on the DRB.

### 3. WHAT TYPE OF SUCCESS HAVE YOU HAD WITH THE BOARD?

The board has been a great success. Last year WESTDIV had a backlog of between 250 - 260 claims of ages varying from 3 months to 5 years. In the last year we have reduced the backlog down to about 30 cases. We have issued some 50 Contracting Officer's final decisions and to date have had only 4 appeals to ASBCA. About one-third of the cases have been denied, about one-third have had a final decision issued and one third returned for negotiation. Some of the cases have been withdrawn or settled during the board hearing once each side hears the other side's case.

### 4. IT SOUNDS LIKE WHAT YOU'RE DOING IS SERVING AS A MEDIATION PANEL FOR SOME OF THE CASES. WHAT WOULD BE YOUR OPINION OF USING AN OUTSIDE MEDIATOR INSTEAD OF YOUR BOARD?

Mr. Sabadini said he felt that would put an unnecessary





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### 4. IT SOUNDS LIKE WHAT YOU'RE DOING IS SERVING AS A MEDIATION PANEL FOR SOME OF THE CASES. WHAT WOULD BE YOUR OPINION OF USING AN OUTSIDE MEDIATOR INSTEAD OF YOUR BOARD?

Mr. Sabadini said he felt that would put an unnecessary



additional load on our already overstretched contracting system. It is the job of the EFD staff, specifically the Q5 people to work with both the contractor and the ROICC in working out problems.

5. I EXPLAINED THE DISPUTES REVIEW BOARD USED BY THE CORPS OF ENGINEERS AND ASKED HIS OPINION OF USING IT ON U.S. NAVY CONTRACTS.

Mr. Sabadini said he felt the DRB as used in the Army could be helpful in resolving disputes. An outside, neutral review could help either side take a second look at its position and re-evaluate it.



RESEARCH PAPER INTERVIEW SHEET

INTERVIEWEE: LCDR Ken Butrym      ORGANIZATION: NAVFAC CONTRACTS OFFICE, NAS  
ATLANTA

TELEPHONE NUMBER: 421-5512

INTERVIEW DATE: 10 May 1990

I. INITIAL QUESTIONS/RESPONSES:

1. Are you familiar with the ADR (arbitration/mediation) procedures currently being used by private industry in lieu of litigation?

Only a little

2. Of the disputes/claims your office handled last year how many do you feel could have been resolved if a truly neutral third party had been available to assist the field office and the Contractor reach an agreement.

10 - 20 %

3. How many man-hours do you estimate are expended each year in handling claims at your Field Activity.

150 - 200

4. If some form of third party mediation or arbitration was available to be used in resolving disputes that could not be handled through negotiation, would your office use it.

It would depend on the reason for unsolvability





## RESEARCH PAPER INTERVIEW SHEET

INTERVIEWEE: Mark H. Massee

ORGANIZATION: Massee Builders

TELEPHONE NUMBER: 912 423-3131

INTERVIEW DATE: May 14, 1990

### I. INITIAL QUESTIONS:

1. What percentage of your member's work is done with the Department of Defense

Varies considerably from year to year (0-50%) but averages about 25%.

2. What is your organization's opinion of the Federal Claims Process?

Have only used the process once or twice, but have found that it is slow and somewhat expensive compared to possible alternatives to the process.

3. How much would you estimate it costs one of your members to take a claim to the Armed Services Board of Contract Appeals?

I do not have a real good feel for it and it would depend on whether hearings are necessary. Probably \$500.00 on the average.

4. Are you familiar with Alternative Dispute Resolution procedures used in private industry?

I am familiar with it but have never actually used the procedures.

5. What is your organization's opinion of ADR procedures in use in the private sector?

Unsure - I have not used them

6. If such procedures were available for use in Government Contract Dispute Resolution would you encourage your members to use them?

Yes - It would probably be an improvement to the Federal Claims Process.

7. If such a procedure were available on Government contracts, would your members be willing to bid on more Government work?

Since we rarely use the claims process, it would probably not affect our bidding that much.



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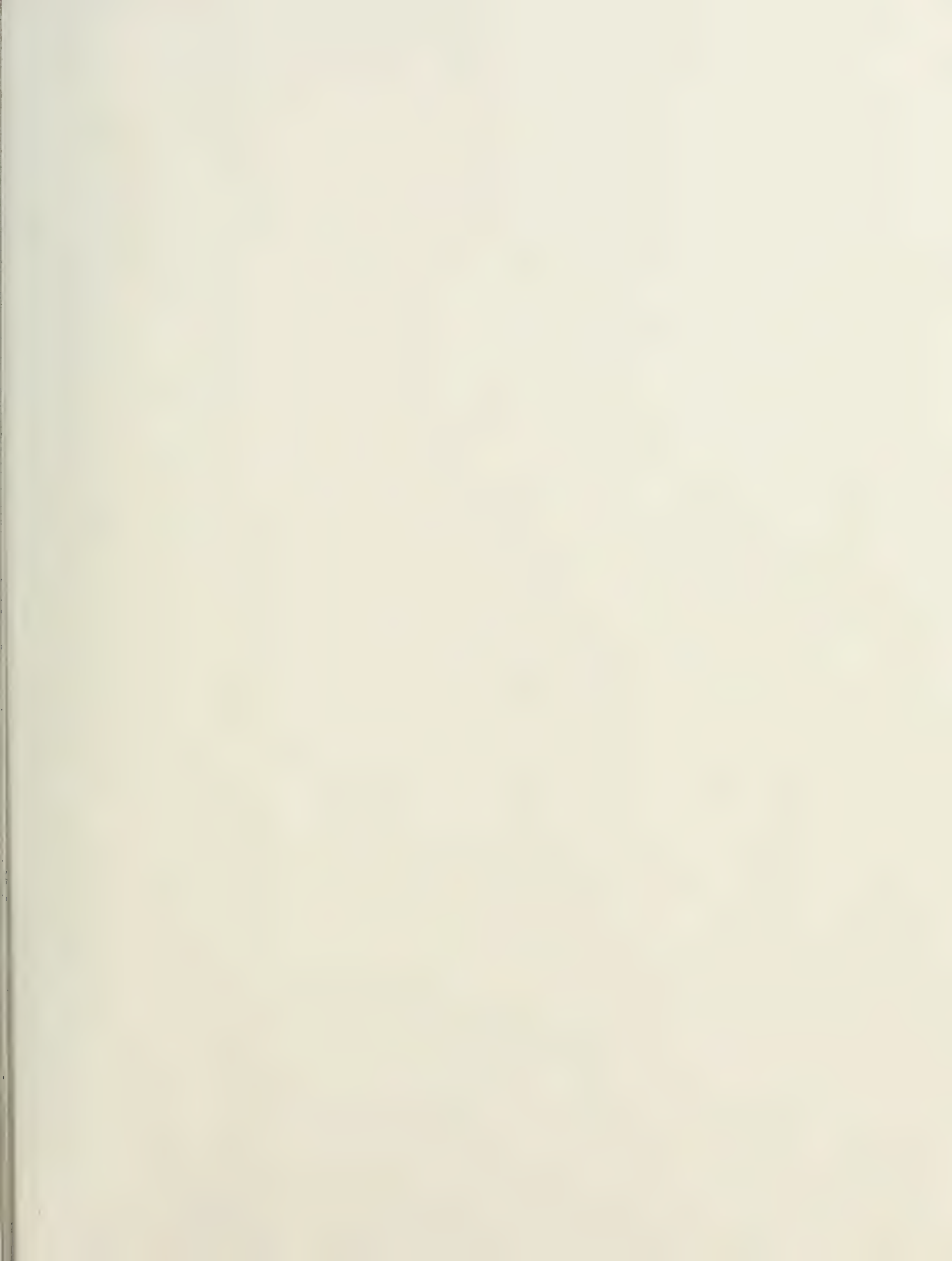
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Thesis

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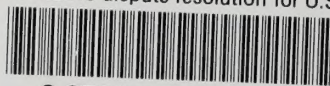
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